EDITOR'S NOTE

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). 84-1560-CSX
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)cketed:
)rch 29, 1985

Title: Press-Enterprise Company, etc., Petitioner
v.
Superior Court of California for the County of Riverside

Court: Supreme Court of California

Counsel for petitioner: Ward, James D.

Counsel for respondent: Reikes, Joyce Eller Manulis, Margolin, Ephraim

)try	Date	Note	Proceedings and Orders
1	Mar 29 1985	G	Petition for writ of certiorari filed.
2	Apr 29 1985		Brief amicus curiae of Copley Press, Inc., et al. filed.
3	May 7 1985		DISTRIBUTED. May 23, 1985
4	May 20 1985	F	Response requested.
5	Jun 19 1985		Brief of respondent Superior Court of CA, Riverside in opposition filed.
6	Jun 25 1985		REDISTRIBUTED. September 30, 1985
8	Oct 7 1985		REDISTRIBUTED. October 11, 1985
9	Oct 15 1985		Petition GRANTED.
			**********
10	Nov 23 1985	G	Motion of respondent to supplement the record and leave to file supplemental appendix filed.
11	Nov 27 1985		Brief amicus curiae of American Newspaper Publishers Association, et al. filed.
12	Nov 27 1985		Joint appendix filed.
13	Nov 27 1985		Brief of petitioner Press-Enterprise Co. filed.
14	Dec 2 1985		DISTRIBUTED. Dec. 6, 1985. (Motion to supplement the record and leave to file supplemental appendix).
15	Nov 29 1985		Brief amicus curiae of California filed.
16	Nov 27 1985		Brief amicus curiae of Copley press, Inc., et al. filed.
17	Nov 27 1985		Brief amicus curiae of ACLU, et al. filed.
19	Dec 2 1985		Opposition of Press-Enterprise Co., etc. to motion of respondent to supplement the record filed.
20	Nov 27 1985		Brief amicus curiae of District Attorney, County of Riverside filed.
21	Dec 2 1985		REDISTRIBUTED. December 6, 1985
22	Dec 9 1985		Motion of respondent to supplement the record and leave to file supplemental appendix GRANTED.
23	Dec 24 1985		Record filed.
24	Jan 3 1986		Brief of respondent Sup. Ct. of CA, Riverside filed.
26	Jan 3 1986		Supplemental Appendix of Respondent.
27	Jan 7 1986		SET FOR ARGUMENT, Wednesday, February 26, 1986. (2nd case)
28	Jan 7 1986		CIRCULATED.
29	Jan 13 1986	X	Brief of respondent Robert Ruban Diaz filed.
30	Feb 20 1986	X	Reply brief of petitioner Press-Enterprise Co. filed.
31	Feb 26 1986		ARGUED.

84-1560

No. ____

In the Supreme Court

OF THE

United States

OCTOBER TERM

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS.

ROBERT RUBANE DIAZ,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the public's right of access to criminal proceedings, guaranteed by the United States Constitution First Amendment, extends to pretrial proceedings, in particular, preliminary hearings.

2. Whether the standard for closure of preliminary hearings under *California Penal Code,* Section 868 set by the California Supreme Court violates the constitutional rights of the public, including the press.[1]

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[1]The parties to this action are The Press-Enterprise Company, Superior Court of the State of California, County of Riverside. In compliance with Rule 28.1 of the Rules of the Supreme Court, petitioner advises the Court that it is a California corporation and has no subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

ORDERS BELOW

The Order of the California Supreme Court was reported and appears in the Appendix hereto (See Appendix, page 1). The order of the California Court of Appeals, Fourth District, Division Two was reported and appears in the Appendix hereto (See Appendix, page E-1).

JURISDICTION

The Order of the California Supreme Court was entered on December 31, 1984, and became final on January 31, 1985. Under 28 U.S.C., Section 1257(3), this Court's jurisdiction is invoked.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment 14, Section 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At issue in the instant case is the public's constitutional right of access to pretrial criminal proceedings, specifically, its right of access to preliminary hearings and the transcripts thereof.[2]

The defendant, ROBERT RUBANE DIAZ, was charged by a complaint filed in the municipal court with the murder of 12 hospital patients by administrating massive doses of the heart drug, lidocaine, which put him in risk of the death penalty. At the time of the preliminary hearing, representatives of television stations, radio stations and newspapers were present. On DIAZ's motion, pursuant to *California Penal Code*, Section 868, the court ordered the preliminary hearing closed to the public, including the press. The preliminary hearing lasted a period of 41 days and DIAZ was held to answer on all charges. The judge then sealed all transcripts.

Approximately seven months later, petitioner sought to gain access to the transcripts in the superior court. Defendant DIAZ opposed, presenting evidence of publicity given the case by the media, some of which had continued until the time of the hearing. The court determined that the defendant had a right to trial without undue delay and a Sixth Amendment right to trial in the vicinage. It further determined that there was a "reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial" and he ordered the transcript remain sealed.

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[2]The transcripts of the proceeding were ultimated released by the superior court after the defendant, ROBERT RUBANE DIAZ, waived his right to a jury trial. Although technically moot, the California Supreme Court determined that the case presented an important question affecting the public interest.

Petitioner then sought relief in the Court of Appeal, Fourth District, Division Two, through a Petition for Writ of Mandate to compel the respondent court to vacate its order and to release the transcripts to the public. The appellate court summarily denied petitioner's request, without articulation.

Thereafter, petitioner filed a Petition for Hearing to the California Supreme Court. On May 19, 1983, the supreme court granted the Petition for Hearing and ordered the matter retransferred to the Court of Appeal, Fourth District, Division Two, with directions to issue an alternative writ of mandamus and to set the matter for hearing. On June 27, 1983, the court of appeal issued an alternative writ of mandate and the matter was heard on October 5, 1983.

On January 12, 1984, the court of appeal filed its opinion discharging the alternative writ of mandate and denying issuance of a peremptory writ. In its opinion, the court determined that there was no constitutional right of public access to preliminary hearings. Additionally, the appellate court determined that the public's statutory right of access arising under *California Penal Code*, Section 868 could be foreclosed upon a showing of a "reasonable likelihood of substantial prejudice" which would infringe on the defendant's right to a fair trial.

On February 21, 1984, petitioner filed a Petition for Hearing in the California Supreme Court. The Petition for Hearing was granted and the matter set for hearing. On December 31, 1984, the California Supreme Court rendered its decision determining that the First Amendment of the United States Constitution does not provide a right of access to preliminary hearings. It further determined that the statutory right of access under *Penal Code*, Section 868 could be denied upon showing of a "reasonable likelihood of substantial prejudice" to the defendant's right to a fair trial.

REASONS FOR GRANTING THE WRIT

I

IN DENYING THE PUBLIC A CONSTITUTIONAL RIGHT OF ACCESS, THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH DECISIONS BY OTHER STATE AND FEDERAL COURTS.

Since this Court's decision in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), considerable uncertainty has existed throughout the state and federal courts on the issue of whether the First Amendment right of access extends to pretrial proceedings. In *Gannett*, this Court specifically reserved that question for future consideration. It is imperative that this Court now resolve this issue.

The issue of the public's right of access to pretrial criminal proceedings has received varying treatment throughout the states, resulting in protection of this important right being dependent upon geographic location. Equal protection of this right can only be achieved by a decision from this Court.

In the federal courts which have addressed this matter, there is generally unanimity that the public's constitutional right of access extends to pretrial criminal proceedings. *Application of the Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982). Yet, noticably lacking is the same consistency as to when closure is constitutionally permissible.

The Third Circuit has determined that before a trial court can close a hearing, it must "make specific findings to support its conclusion that other means will be insufficient to preserve the defendant's rights and that closure is necessary to protect effectively against the perceived harm." *United States v. Criden*, 675 F.2d at 561-62. The Ninth Circuit, however, has stated that closure is permitted only when there is a showing of a "substantial probability that irreparable damage to the defendant's fair-trial right will result; a substantial probability that alternatives to closure will not adequately protect this right; and a substantial probability that closure will be effective in protecting against the perceived harm." *United States v. Brooklier*, 685 F.2d at 1162.

According to the Fifth Circuit, the defendant seeking to close a pretrial hearing must merely show that his Sixth Amendment right is "likely to be prejudiced," that alternatives to closure are inadequate, and that "closure will probably be effective." *United States v. Chagra*, 701 F.2d at 365. The Second Circuit, on the other hand, requires a showing of a "significant risk of prejudice" and further requires the trial court to consider alternatives to closure and "reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue." *Application of the Herald Co.*, 734 F.2d at 100.

In the state courts, an even greater disparity in reasoning and holdings exists. To date, at least seventeen states have addressed the issue of the public's right of access to pretrial criminal proceedings.

Eleven states have determined that a right of access to pretrial criminal proceedings arises under the First Amendment, under state law, or under both. *Arkansas Television Co. v. Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983) (suppression hearing); *Ashland Pub. Co. v. Asbury*, 612 S.W.2d 749 (Ky.Ct.App. 1980), (various pretrial proceedings); *Buzbee v. Journal Newspapers Inc.*, 297 Md. 68, 465 A.2d 426 (1983), (suppression hearing); *Minneapolis Star & Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983), (change of venue and suppression hearings); *State ex rel. Smith v. District Court of Eighth Judicial District, Cascade County*, 654 P.2d 982 (Mont. 1982), (suppression hearing); *State v. Williams*, 93 N.J. 39, 459 A.2d 641 (1983), (probable cause and bail application hearings); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979), (mental competency hearing); *Petition of the Daily Item*, 310 Pa.Super. 222, 456 A.2d 580 (1983), (preliminary hearing); *Kearns-Tribune Co., Publisher of Salt Lake Tribune v. Lewis*, 685 P.2d 515 (Utah 1984), (preliminary hearing); *Herald Assoc. v. Ellison*, 138 Vt. 529, 419 A.2d 323 (1980), (suppression hearing); *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544 (W.Va. 1980), (suppression hearing).

Even within these states which have recognized a right of access, there is a divergence of opinion as to when and under what circumstances that right may be foreclosed.

Six states, however, including California in the instant case, have determined that there is no constitutional right of access to pretrial criminal proceedings. *State v. Burak*, 37 Conn.Supp.627, 431 A.2d 1246 (1981), (suppression hearing; *In re Midland Publishing Co., Inc. v. District Court Judge*, No. 68862 (Mich. Dec. 28, 1984), (preliminary hearing); *Dickinson Newspapers Inc. v. Jorgensen*, 338 N.W.2d 72 (N.D. 1983), (preliminary hearing); *Steinle v. Lollis*, 279 S.C. 375, 307 S.E.2d 230 (1983), (preliminary hearing); *State ex rel. Feeney v. District Court of the 75th Judicial District*, 607 P.2d 1259 (Wyo. 1983), (various pretrial proceedings).

Undeniably, the public's First Amendment right of access and the extent to which it pertains to a pretrial criminal proceeding is a question of significant importance. Numerous lower courts have grappled with the issue, but no concensus of opinion has emerged. Until this Court resolves this matter, uniform recognition and protection of this important right will not occur.

II

THE CALIFORNIA SUPREME COURT FAILED TO FOLLOW PRIOR DECISIONS OF THIS COURT BY IGNORING THE SOCIETAL FUNCTIONS SERVED BY PUBLIC ACCESS TO CRIMINAL COURT PROCEEDINGS, IN PARTICULAR, PRELIMINARY HEARINGS.

In its determination that the constitutional right of access does not extend to preliminary hearings, the California Supreme Court utterly ignored the important societal functions served by allowing access as stated by this Court repeatedly. By so doing, the opinion is contrary to decisions of this Court requiring a consideration of the structural importance of the proceeding.[3]

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[3]While a review of the historical evidence of a particular proceeding is often helpful in determining whether a First Amendment right of access extends to the proceeding, the history of preliminary hearings is inconclusive. It appears that preliminary hearings may have been closed to the public at early common law (*Gannett v. DePasquale*, 443 U.S. at 437 (Blackman, J., concurring in part and dissenting in part), but they were closed not only to the public but to the accused's counsel as well. See, e.g., *Cox v. Coleridge*, 1 B. & C. 37, 107 Eng.Rep. 15 (1822).

In this country, however, preliminary hearings traditionally have been open. Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. Law Review 397, 407 (1961). Even in those jurisdictions which adopted the Field Code provision allowing closure of the preliminary hearings upon the request of the defendant, the provision rarely was invoked until the 1960's when the California Supreme Court decided *People v. Elliott*, 54 Cal.2d 498; 354 P.2d 225, 6 Cal.Rptr. 753 (1960).

This Court has recognized numerous benefits accruing from public access to criminal proceedings. Access helps to insure the basic fairness of the proceeding, encouraging all participants to perform their duties conscientiously (*Gannett v. DePasquale*, 443 U.S. at 383; *id.* at 434 [Blackman, J., concurring in part and dissenting in part]) discouraging misconduct and abuse of power by judges, prosecutors, and other participants (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (Burger, C.J., plurality opinion); *id.*, at 596 (Brennan, J., concurring)). Additionally, open proceedings assure accurate fact-finding through the improvement of witness testimony by discouraging witnesses from committing perjury (*Id.*, at 569; *Gannett*, 443 U.S. at 427) and by inducing unknown witnesses to come forward and testify (*Richmond Newspapers*, 448 U.S. at 570, n.8 *id.*, at 596-97; *Gannett*, 443 U.S. at 383).

Public access also serves to educate the public about the criminal justice process (*Richmond Newspapers*, 448 U.S. at 572-73; *Gannett*, 443 U.S. at 383) which is essential to informed citizen debate and decision-making about issues with significant effects beyond the outcome of the particular proceeding.

Public access serves an important "sunshine" function as closed proceedings may foster distrust of the judicial system (*Id.* at 429). Thus open proceedings enhance the appearance of justice and helped maintain public confidence in the judicial system. (*Richmond Newspapers*, 448 U.S. at 570-71; *id.*, at 594-95). Finally, access can also serve a community therapeutic function by allowing the public to see that justice is done. (*Id.*, at 571-572).

These critical benefits are the very foundation for this Court's recognition of a constitutional right of access to criminal trials. Analysis of the extent to which these same benefits would accrue from open pretrial proceedings is helpful in determining if the access right extends to those proceedings. In particular, whether the right of access should extend to a preliminary hearing must be dependent upon the important societal functions served by allowing access to the proceeding.

The preliminary hearing is a "critical stage" in the criminal justice process (*Hawkins v. Superior Court*, 22 Cal.3d 584, 586 P.2d 916, 150 Cal.Rptr. 435 (1978)) wherein the defendant "immediately becomes entitled to an impressive array of procedural rights . . ." *Id.*, at 587.

At the preliminary hearing, the defendant has a right to counsel (*California Penal Code*, Section 866.5), witnesses are examined in the presence of the defendant and are subject to cross-examination (*California Penal Code*, Section 865), the defendant is entitled to present witnesses on his or her own behalf and to testify (*California Penal Code*, Sections 866 and 866.5) and "a neutral and legally knowledgeable magistrate" is required to "weigh the evidence, resolve conflicts and give or withhold credence to particular witnesses." *Jones v. Superior Court*, 4 Cal.3d 660, 483 P.2d 1241, 94 Cal.Rptr. 289 (1971). The preliminary hearing in California has almost all the attributes of a trial in California.

Additionally, preliminary hearings may be the only judicial proceeding of substantial importance that takes place during a criminal prosecution, because so many cases are disposed of without trial. *San Jose Mercury News v. Municipal Court*, 30 Cal.3d 498, 638 P.2d 655, 179 Cal.Rptr. 772 (1982). Just as significant, the hearing often provides the forum for issues involving police misconduct and exclusion of evidence. *Id.* at 511.[4] Since what transpires at the preliminary hearing often determines the ultimate disposition of the case it is, without question, a vital stage in the criminal justice process.

Clearly, public scrutiny of the preliminary hearing will enhance the quality and safeguard the integrity of this fact-finding process, and improve the quality of the testimony and provide a means whereby unknown witnesses may become known. Access will also serve to educate the public about this critical stage in the criminal process, thereby enhancing their understanding of the entire criminal justice system.

Accordingly, the reasoning of this Court in support of a right of access to the trial itself applies with equal force to this pretrial proceeding. By failing, in its determination, to consider the societal functions served by allowing access, the California Supreme Court's opinion denying a constitutional right of access to preliminary hearing is without foundation.

III

THE STANDARD FOR CLOSURE SET BY THE CALIFORNIA SUPREME COURT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

In addition to its determination that the constitutional right of access does not extend to preliminary hearings, the supreme court also determined that, under *California Penal Code*, Section 868, such hearings may be closed upon a

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[4]The very length of preliminary hearings in California further emphasizes their significance. The preliminary hearing in the instant case lasted a total of forty-one (41) days and there appears to be a trend toward hearings of this length or longer in cases of considerable community interest and importance.

showing of a "reasonable likelihood of substantial prejudice." Petitioner recognizes that this normally would be simply a matter of statutory interpretation, not reviewable by this Court. However, with the right of access extending to preliminary hearings, the standard set by the supreme court infringes upon this First Amendment right, rendering *California Penal Code*, Section 868 unconstitutional in its application.

This Court, has determined that closures "must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Company v. Superior Court*, 464 U.S. ____ (1984). A trial court, before closing a criminal proceeding, must determine that closure is "essential to preserve higher values" and "narrowly tailored to serve that interest". *Id.* Thus, before closure can be allowed, the court must be satisfied that closure is necessary to protect an overriding interest and that no alternative means are available to preserve that interest.

Allowing a preliminary hearing to be closed upon a mere showing of "reasonable likelihood of substantial prejudice," as directed by the California Supreme Court, unconstitutionally permits closures that are not "essential to preserve higher values". Nor does the standard set by the California Supreme Court require a consideration of alternative means to protect the interests at issue or require the trial court to assure that any closure is narrowly tailored to serve the interest at issue. Clearly, the loose standard set by the California Supreme Court will allow for unnecessary closures, making closing of courts the rule, rather than the exception.

CONCLUSION

This court has consistently recognized that openness, with the rarest of exceptions, will actually serve to enhance the basic fairness of our system of justice by assuring that established procedures are being followed and that any deviations will become known. Notwithstanding this, due to the lack of a clear statement from this Court that the right of access protected by the First Amendment extends to critical pretrial proceedings, the rights of the public continue to be curtailed. The time has now come for this Court to address the question left open in *Gannett v. DePasquale* and to eliminate the conflict and confusion which presently exists.

DATED: March 29, 1985

THOMPSON & COLEGATE

By: JAMES D. WARD

Attorneys for Petitioner
The Press-Enterprise Company

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PRESS-ENTERPRISE COMPANY,
Petitioner,
vs.
THE SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent;
ROBERT RUBANE DIAZ,
Real Party in Interest.
L.A. 31876

SUPREME COURT
FILED
DEC. 31, 1984
Laurence P. Gill, Clerk
Deputy

In the instant case we consider the appropriate standard to be applied by a magistrate in determining whether the public's right of access to preliminary hearings should be limited due to the risk of impairment of a defendant's right to a fair trial.

The real party in interest, Robert Rubane Diaz, was charged by a complaint filed in the municipal court with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. He was also charged with special circumstances. At the time of the preliminary hearing there were many representatives of television stations, radio stations and newspapers present. On Diaz' motion pursuant to Penal Code section 868,[1] the court ordered the preliminary hearing closed to the press and public. The preliminary hearing was held over a period of

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[1]Unless otherwise indicated, all statutory references are to the Penal Code.

41 days, and Diaz was held to answer on all charges. The judge sealed all transcripts.

SEE CONCURRING AND DISSENTING OPINIONS

About seven months later, petitioner sought to gain access to the transcripts in the superior court. The prosecution joined in the motion. Diaz opposed, presenting evidence of the widespread publicity given to the case by the media, some of which had continued until the time of the hearing. The judge, concerned that releasing the transcript might require either delay of the proceedings or transfer of the trial to another jurisdiction, pointed out that defendant had a right to trial without undue delay and a Sixth Amendment right to trial in the vicinage. The judge found that "there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." He ordered that the transcript remain sealed, and petitioner commenced the instant mandamus proceeding.[2]

THE ASSERTED CONSTITUTIONAL RIGHT OF ACCESS

Prior to its 1982 amendment, section 868 provided that upon the request of the defendant, the magistrate shall exclude the public from the preliminary examination. In San Jose Mercury-News v. Municipal Court (1982) 30 Cal. 3d 498, the statute was upheld against a claim that the federal and state Constitutions give the press and public a right of access to preliminary hearings that may be foreclosed only when outweighed by defendant's interest in a fair trial and that section 868 violated that right because it had no provision for balancing of competing interests in individual cases.

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[2]The trial has been completed. Although technically moot, the case presents an important question affecting the public interest, and review is appropriate. (San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, 501, fn. 2.)

In considering the claim of violation of federal constitutional rights, the court recognized that the United States Supreme Court has held that the First Amendment provided a qualified right of public access to the trial and that a majority of justices had recognized a qualified right of access to pretrial hearings such as suppression hearings. (30 Cal.3d at pp. 503-506.) The court pointed out that the basis of the qualified access right was the long history of trials being presumptively open and that the open trial tradition guards against persecution and favoritism, increases public awareness of the judicial process, inspires confidence in the criminal justice system, and serves the cathartic needs of the community. (30 Cal.3d at p. 505.)

In *San Jose Mercury-News,* the court also pointed out that seven of the United States Supreme Court justices had stated that preliminary hearings, unlike trials, were traditionally private at common law and were distinguishable from pretrial suppression hearings. (30 Cal.3d at pp. 504-506.) This court concluded that no right of access arose under the First Amendment. (30 Cal.3d at p. 506.)

In rejecting the claim of conflict with the California Constitution, the court recognized that state constitutional guarantees may give greater protection to some rights than the federal counterparts, but concluded that the Legislature reasonably gives fair trial rights a preference over access rights in certain classes of proceedings where danger of prejudice is strong and proof on a case-by-case basis appears difficult and that section 868 was a permitted means of protecting defendants' rights to a fair trial free of juror bias.[3] (30 Cal.3d at pp. 506-514.)

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[3]Because they bear on the proper interpretation of section 868 as amended in 1982, the policy concerns which led to the court's conclusion will be discussed in detail in the statutory portion of the opinion.

Petitioner urges that recent decisions of the United States Supreme Court require repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to a preliminary hearing. Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, involved a Massachusetts statute requiring mandatory closure of trial during the testimony of a minor sex victim. The court again relied upon the tradition of trials being open to the press and public, and it asserted that before a state may deny the right of access it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. (457 U.S. at pp. 603-607.) Responding to an argument that trials have not always been open during testimony of minor sex victims, the court in a footnote stated that whether the First Amendment right of access can be restricted in the context of any criminal trial depends not on the historical openness of that type of trial but rather on the state interests assertedly supporting the restriction. (457 U.S. at p. 605, fn. 13.) The court concluded that the Massachusetts statute was not narrowly tailored to accommodate the state's compelling interest in protecting the physical and psychological well-being of a minor and that rather than mandatory closure the state's interest may be protected by a case-by-case determination whether closure is necessary to protect the welfare of the minor. (457 U.S. at p. 608.)

The second case relied upon by petitioner is Press Enterprise Company v. Superior Court (1984) ____ U.S. ____ [78 L.Ed.2d 629, 104 S.Ct. 819], where the court held that an order closing voir dire proceedings was invalid on the ground that the trial judge had failed to consider alternative measures. In a concurring opinion, Justice Stevens stated that the purpose of the access right is assuring freedom of communication on matters relating to the functioning of government and that "the distinction between trials

and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." (____ U.S. at p. ____ [78 L.Ed.2d at p. 742, 104 S.Ct. at p. 828].)

Neither case warrants repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to preliminary hearings. Both cases were concerned with the right of access to trials rather than preliminary hearings. The problem of potential prejudice to the defendant is substantially different in relation to public trials than it is in relation to public preliminary hearings. In *Press Enterprise Company* the court emphasized that prejudice to the defendant remains the primary con ern, stating: "No right ranks higher than the right of the accused to a fair trial." (____ U.S. at p. ____ [78 L.Ed. 2d at p. 637, 104 S.Ct. at p. 823].) The main concern asserted in both cases to justify closure was not prejudice to the defendant but the interests of others, i.e., the privacy rights of prospective jurors and the physical and psychological well-being of minor sex victims.

While a footnote in *Globe Newspaper Co.* suggests that historical openness may no longer be an element of the First Amendment access right, the footnote by its own language is limited to trials. (Globe Newspaper Co. v. Superior Court, *supra*, 457 U.S. at p. 605, fn. 13.) The subsequent *Press Enterprise Company* decision not only indicates that one of the bases of the access right to trials as established by Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555 is that trials were open at the time of the adoption of the First Amendment but also devotes the first portion of the opinion to establish that at the time of the adoption of the First Amendment public jury selection was the common practice in America. While the statement of Justice Stevens relied upon by petitioner is to the effect that the access right

is not limited to trials, it does not establish that historical conditions are irrelevant because he also states that the question before the court " 'focuses . . . on First Amendment values and the historical backdrop against which the First Amendment was enacted.' " (___ U.S. at p. ___ [78 L.Ed.2d at p. 642, 104 S.Ct. at p. 828].)

We conclude that petitioner and amici have failed to establish a basis for repudiating the conclusion in the 1982 decision in *San Jose Mercury-News* that the First Amendment access right does not extend to preliminary hearings. In addition, petitioner and amici have not pointed to any matters warranting repudiation of the portion of *San Jose Mercury-News* relating to the California Constitution.

THE STATUTORY ACCESS RIGHT

Shortly after the decision in 1982 in *San Jose Mercury-News*, the Legislature amended section 868 to delete the defendant's absolute right to closure and to establish a right of access to preliminary hearings. The amended section reads: "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is *necessary* in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination [all but certain enumerated officials, defendant and his counsel, and the prosecuting witness and a friend.]" (Italics added.)

The parties and amici dispute the appropriate standard to be applied by the magistrate in determining whether exclusion is "necessary" in order to protect the defendant's right to a fair and impartial trial. Some of the language in the brief submitted by amici suggests that exclusion is appropriate only if the magistrate finds that failure to exclude will result in an unfair trial.

Petitioner argues for the test set forth in United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167 where the court stated that an "accused who seeks closure must establish 'that it is strictly and inescapably necessary in order to protect the fair trial guarantee.' This burden may be discharged by demonstrating: (1) 'a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public'; (2) 'a substantial probability that alternatives to closure will not protect adequately his right to a fair trial'; and (3) 'a substantial probability that closure will be effective in protecting against the perceived harm.' " *Brooklier* did not involve preliminary hearings but rather hearings on motions to suppress and the juror voir dire. The *Brooklier* test is based on the dissenting opinion of Justice Blackmun in Gannett Co. v. DePasquale (1979) 443 U.S. 368, 406, 440-446. Justice Blackmun, joined by Justices Brennan, White and Marshall, urged that the Sixth Amendment right to a public trial was not personal to the defendant but established an access right for the public. The majority rejected that view.[4]

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[4]Justice Blackmun recognized that in some cases of suppression hearings closure might be justified. "The trial judge faced with a closure motion has the more difficult task of looking into the future. I do not mean to suggest that only in the egregious circumstances of cases such as *Estes* and *Sheppard* would closure be permissible. But to some extent the harm that the defendant fears from publicity is also speculative."

"If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require. Thus, it might well be possible to exclude the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while

Defendant urges that the proper test is that the preliminary hearing must be closed upon a defendant's request if the magistrate finds "a reasonable likelihood" of substantial prejudice which would impinge upon the right to a fair trial. The trial court purported to apply this test. The test appears to be based on the concurring opinion of Justice Powell in Gannett Co. v. DePasquale, *supra*, 443 U.S. 368, 397-403. He joined the majority opinion in holding that the Sixth Amendment did not confer access rights but concluded that the First Amendment provides a limited right of access to suppression hearings. He rejected Justice Blackmun's test for closure on the ground that it was inflexible and could prejudice defendant's rights and disserve society's interest in the fair and prompt disposition of criminal trials. He concluded that the test is whether "a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury." (443 U.S. at p. 400.) He stated that it is the defendant's responsibility to show that public access would interfere with the fairness of his trial but that those opposing closure have the burden of showing that alternative procedures are available that would eliminate the danger of prejudice.[5]

The test of reasonable likelihood that the defendant will not receive and impartial trial is used in considering mo-

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admitting to other portions where the information the accused seeks to suppress would not be revealed. *United States* v. *Cianfrani*, 573 F.2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed." (443 U.S. at pp. 444-445.)

[5]In *Gannett Co.* the trial judge found "a reasonable probability" of prejudice, and the majority held this would overcome a First Amendment right of access.

tions for change of venue. (Odle v. Superior Court (1982) 32 Cal. 3d 932, 937; Martinez v. Superior Court (1981) 29 Cal.3d 574, 578.) Also the test has been used with respect to gag orders. (Younger v. Smith (1973) 30 Cal.App.3d 138, 159-164; see Brian W. v. Superior Court (1978) 20 Cal.3d 618, 624, fn. 7.) The Legislature has established a standard of reasonable likelihood of prejudice to the defendant to be applied in determining whether a grand jury transcript should be unsealed. (§ 938.1, subd. (b).) The test has also been applied in determining whether a purported confession should be suppressed pending trial. (Cromer v. Superior Court (1980) 109 Cal.App.3d 728, 731 et seq.)

The legislative history of the amendment to section 868 shows that the Legislature intended the courts to determine the appropriate standard. Assembly Bill No. 277 as originally introduced and as adopted opens preliminary hearings unless the magistrate finds it "necessary" to close to protect the defendant's right to a fair trial. As originally worded, the bill provided that the finding that it is necessary to close "would require a demonstration of a clear and present danger of irreparable damage to the defendant's right to a fair and impartial trial, that the alternatives to closure will not adequately protect that right, and that the closure will effectively protect against the perceived harm." In the Assembly, the second condition relating to alternatives to closure was deleted before the bill was passed.

Clear and present danger language was contained, although in slightly different form, in the bill passed by the Senate, but the Conference Committee report was rejected in the Assembly, and the bill was amended in the Assembly to substitute "preponderant probability" for "clear and present danger." The bill was amended in a second Conference Committee report to delete all of the language defining "necessary," and as finally approved, the amendment

to section 868 provides no definition of "necessary." (The bill as enacted also dealt with matters other than the amendment of section 868.)

The deletion of any definition of the word "necessary" shows that, while the Legislature concluded that preliminary hearings should be public unless there was conflict with the defendant's right to a fair trial, the Legislature intended that the courts should determine the standard to be applied in weighing the public's right of access against the defendant's fair trial right.

In San Jose Mercury-News, the court detailed the policy factors in favor of holding preliminary hearings in public: Exposure of government functions to public view serves societal interests in a democratic government. Open preliminary hearings guard against persecution and favoritism, increase public awareness of the judicial process, inspire confidence in the criminal justice system, and serve the cathartic needs of the community. Preliminary hearings are an important step in the accusatorial process. There are many similarities to the trial; witnesses may be cross-examined, each side has an incentive to prevail, and the hearing may reveal weaknesses in the prosecution or defense, forecasting the ultimate disposition.

Often the preliminary hearing turns out to be the only judicial proceeding of substantial importance that takes place during a criminal prosecution because so many cases are disposed of without trial. The hearing often provides the forum for issues involving police misconduct and exclusion of evidence. The court also pointed out that pretrial publicity, even pervasive adverse publicity, does not invariably lead to an unfair trial. (30 Cal.3d at pp. 505, 509-514.)

On the other hand, the court in *San Jose Mercury-News* pointed to several concerns militating against a public

preliminary hearing and against requiring defendant to establish that prejudice will occur from a public hearing. While the Legislature has since amended section 868 to delete the defendant's absolute right to closure, the concerns enumerated in *San Jose Mercury-News* obviously bear upon our determination of the appropriate standard to be applied under the amended statute.

The concerns militating in favor of a right of closure recognized by the court include: The evidence at the preliminary hearing may be one-sided and misleading because the testimony is often that of the prosecution only — the defense remaining silent if it appears that reasonable or probable cause has been established. Many nonlawyers may not be aware of the function of a preliminary hearing which is not a trial with the danger that they may ascribe to a one-sided hearing the legitimacy and credibility of a trial. Magistrates may err in their evidentiary hearings, and there is a danger that highly prejudicial evidence which will be inadmissible at trial will be admitted or adverted to and reported by the media.

In addition factual, relevant reporting, no less than inflammatory publicity, may threaten a defendant's right to a fair trial by producing a jury pool "within which a defendant's guilt has already been ascribed." (30 Cal.3d at p. 512.)

Because the preliminary hearing takes place at an early stage in the criminal prosecution, it may be difficult or impossible for the defendant to make a showing of the prejudice which will occur from publicity. At an early stage, the community reaction and the media attitude may not be clear, and the defendant may have little knowledge of the prosecution's strategy and evidence. "Finally, certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication, can involve equal and even greater intrusions on

speech and press rights. (See, e.g., Nebraska Press Assn., *supra*, 427 U.S. 539, 556-560 [49 L.Ed.2d 683, 695-698]; Brian W., *supra*, 20 Cal.3d 618, 624, fn. 7.) Changes of venue or continuances may subject the parties and courts to considerable inconvenience or expense and may even violate the defendant's right to speedy trial in the vicinage. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; Brian W., *supra*, 20 Cal.3d at p. 625.)" (San Jose Mercury-News v. Municipal Court, *supra*, 30 Cal.3d at pp. 511-513.)

We reject the view that a magistrate in ruling on a request to close the preliminary examination must find that in fact an open preliminary hearing will result in a denial of fair trial. At the time that the magistrate makes the finding predictions must be made as to the amount and nature of publicity which will result from an open preliminary hearing and as to the impact of the anticipated publicity. The legislative history of the two standards contemplated, "clear and present danger" and "preponderant probability," indicates that the Legislature had in mind a lesser standard than a factual finding of actual prejudice.

The legislative history of the two standards contemplated, as well as its use of the word "necessary," makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. "Necessary" is often used in the sense of essential (Webster's New Internat. Dict. (2d ed. 1959) p. 1635), and the terms "clear and present danger" and "preponderant possibility" reflect that a substantial showing of potential prejudice must be made before the preliminary hearing may be closed.

The test urged by defendant, a reasonable likelihood of substantial prejudice, and the test urged by petitioner, a substantial probability of irreparable damage, meet the requirement of a substantial showing of potential prejudice. While there is some difference between the two standards, it obviously is not very great.

Weighing the language of section 868, the legislative history, and the policy factors discussed above, we conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal Code section 868 makes clear that the primary right is the right to a fair trial and that the public's right of access must give way when there is conflict.

Once a defendant establishes a reasonable likelihood of substantial prejudice, there is a clear and present danger of prejudice, and the prosecution or media may overcome the defendant's showing by a preponderance of the evidence to the effect that there is no reasonable likelihood of prejudice. But if the showing in opposition fails to overcome the defendant's showing that there is a reasonable likelihood of substantial prejudice, it would be improper for the magistrate to jeopardize the fair trial right by permitting a public preliminary hearing. The primacy of the right to fair trial, viewed in the light of the policy consideration in favor of closure set forth above, requires us to conclude that a defendant who has established a reasonable likelihood of substantial prejudice after all of the evidence is considered may not be compelled to risk his fair trial by an open hearing.

The peremptory writ of mandate is denied. The alternative writ, having served its purpose, is discharged.

BROUSSARD, J.

WE CONCUR:
BIRD, C. J.
MOSK, J.
KAUS, J.
REYNOSO, J.

APPENDIX B

PRESS-ENTERPRISE COMPANY v. SUPERIOR COURT L.A. 31876

CONCURRING OPINION BY GRODIN, J.

The majority's determination that the First Amendment provides no right of access to preliminary hearings is unnecessary to the decision of this case, and I do not join in it. The only constitutional question presented is whether the First Amendment requires a *greater* right of access than the Legislature has seen fit to establish by statute. I agree with the majority that by its amendment to section 868 the Legislature has decided that open preliminary hearings should be the "rule rather than the exception" (typed op., 16), the exception existing only when exclusion of the public is, to use the language of the statute, "necessary in order to protect the defendant's right to fair and impartial trial."

I agree also that the determination of "necessity" must inevitably be a matter of judgment based upon probabilities, and that the phrase "substantial showing of potential prejudice" (or, what amounts to the same thing, a "reasonable likelihood of substantial prejudice") constitutes a fair description of the requisite assessment. I do not believe that the First Amendment would require more than that.

GRODIN, J.

APPENDIX C

PRESS-ENTERPRISE COMPANY v. SUPERIOR COURT L.A. 31876

CONCURRING AND DISSENTING OPINION BY LUCAS, J.

I concur in the judgment but dissent to the majority's analysis. By reason of the 1982 amendment to Penal Code section 868, preliminary hearings are required to be "open and public" unless the magistrate expressly finds that exclusion of the public is "necessary" to protect the defendant's right to a fair and impartial trial. In the present case, on denying petitioner's motion to inspect the preliminary hearing transcripts, the trial court found merely that there was a "reasonable likelihood" of prejudice to the defendant, a standard which the majority now embraces. Yet a showing of "reasonable likelihood" of prejudice is not equivalent to a showing of *necessity*. In my view, the majority's new standard improperly ignores the statutory language.

As the majority concedes, "The legislative history ... as well as its use of the word 'necessary,' makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. 'Necessary' is often used in the sense of essential ...." (*Ante*, p. ____ [maj. opn. at p. 16].) Although a showing of *actual* prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a *substantial probability* of prejudice. (See United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167.) No such showing was made here.

As the trial is completed and the case is now moot, I concur in the judgment denying the peremptory writ.

LUCAS, J.

APPENDIX D

PRESS-ENTERPRISE CO. v. SUPERIOR COURT
RIVERSIDE
L.A. No. 31876

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Trial Court & No.:

Riverside County
Crim. 19889

Superior Court Judge:

The Honorable
John H. Barnard

APPENDIX E

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

PRESS-ENTERPRISE COMPANY,
Petitioner,
v.
SUPERIOR COURT, RIVERSIDE COUNTY,
Respondent,
ROBERT RUBANE DIAZ,
Real Party in Interest.

COURT OF APPEAL, FOURTH DISTRICT
FILED
JANUARY 12, 1984
KENNAN G. CASADY, Clerk
4 Civil 29785

OPINION

PETITION for writ of Mandate. Riverside Superior Court. John H. Barnard, Judge. Writ denied.

James D. Ward and Sharon J. Waters for Petitioner.

Grover C. Trask II, District Attorney, and Patrick F. Magers, Deputy District Attorney, for Respondent.

Michael B. Lewis, Public Defender, and John J. Lee, Deputy Public Defender, for Real Party in Interest.

Diane C. Campbell for Amicus Curiae on behalf of Respondent and Real Party in Interest.

Petitioner, Press-Enterprise Company, sought access to the transcript of the preliminary hearing of Robert Rubane Diaz. Diaz was charged with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. The hearing was closed at Diaz' request pursu-

ant to Penal Code section 868[1], and thereafter the transcript was ordered sealed. Following the preliminary hearing, Diaz was held to answer in the superior court on all 12 counts. Petitioner attempted to gain access to the transcript, but its request was denied at both the municipal and superior court levels. Petitioner then petitioned this court for a writ of mandate to compel the trial court to vacate its order sealing the transcript. We denied the writ and petitioner petitioned the California Supreme Court seeking a hearing. The Supreme Court granted a hearing and transferred the case to this court with directions to issue an alternative writ of mandate. After complying with this order, we discharge the alternative writ and decline to issue a peremptory writ for the reasons hereinafter set forth.

This case requires the resolution of the following issues: (1) Does the public enjoy a constitutional right of access to preliminary hearings and transcripts generated therefrom?[2] (2) Does a recent amendment to section 868 grant the public a statutory right of access to preliminary hearings and transcripts (3) What standard does section 868 require the court to employ in balancing a defendant's constitutional right to a fair trial against the public's statutory right of access? and (4) Were the closure and sealing orders appropriate in this case?[3]

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[1]All statutory references are to the Penal Code unless otherwise stated.

[2]We note that the public necessarily includes the press because the media has no privileges beyond those of the public generally. (*Houchins* v. *KQED, Inc.* (1978) 438 U.S. 1, 11, 15-16 [57 L.Ed.2d 553, 562, 98 S.Ct. 2588]; *San Jose Mercury-News* v. *Municipal Court* (1982) 30 Cal.3d 498, 503 (hereafter *Mercury-News*).)

[3]Although the issue may now be technically moot, we are empowered to decide moot issues which escape appellate review due to their short durational life, and which present significant questions affecting the public interest. (E.g., *Hardie* v. *Eu* (1976) 18 Cal.3d 371, 379, cert. den., 430 U.S. 969 [52 L.Ed.2d 360, 97 S.Ct. 1652].)

I. Constitutional Considerations: Public Access to Preliminary Hearings and Transcripts.

Petitioner contends that the public has a constitutional right of access to preliminary hearings and transcripts. *Mercury-News, supra*, 30 Cal.3d 498 is dispositive on this issue. In *Mercury-News* the California Supreme Court upheld the constitutionality of former section 868 which required closure of a preliminary hearing at a defendant's request. In reaching this conclusion, the court held the public has no right of access to preliminary hearings under the federal or state Constitutions. (*Mercury-News, supra* 30 Cal.3d at pp. 506, 508-514.)

In *Gannett Co. v. DePasquale* (1979) 443 U.S. 368 [61 L.Ed. 2d 608, 99 S.Ct. 2898] the United States Supreme Court held that a defendant's Sixth Amendment right to a public trial creates no corresponding public right of access to either the trial or a pretrial suppression-of-evidence hearing. (*Gannett Co. v. DePasquale, supra,* 443 U.S. at pp. 384-394.)[4] One year later, in *Richmond Newspapers, Inc.* v. *Virginia* (1980) 448 U.S. 555 [65 L.Ed.2d 973, 100 S.Ct. 2814] the court held the public has a qualified First Amendment right of access to the trial itself. (*Richmond Newspapers, Inc.* v. *Virginia, supra,* 448 U.S. at p. 580.) Analyzing *Gannett* in conjunction with *Richmond Newspapers,* the *Mercury-News* court concluded the right of access did not extend to preliminary hearings.

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[4]"The Sixth Amendment, applicable to the States through the Fourteenth, surrounds a criminal trial with guarantees . . . personal to the accused." (*Gannett Co.* v. *DePasquale, supra,* 443 U.S. at pp. 379-380.) "The history upon which the petitioner and amici rely totally fails to demonstrate that the Framers of the Sixth Amendment intended to create a constitutional right in strangers to attend a pretrial proceeding, when all that they actually did was to confer upon the accused an explicit right to demand a public trial." (Pp. 385-386, fn. omitted.)

Post *Mercury-News* decisions advanced by petitioner do not detract from its dispositive nature. *Globe Newspaper Co.* v. *Superior Court* (1982) 457 U.S. 596 [73 L.Ed.2d 248, 102 S. Ct. 2613] considered a Massachusetts mandatory closure rule which barred press and public access to criminal sex-offense trials during the testimony of minor victims. The court held that the mandatory closure rule violates the First Amendment. (*Globe Newspaper Co.* v. *Superior Court, supra,* 457 U.S. at pp. — [73 L.Ed.2d at pp. 254-260].) Since the opinion in *Globe* was addressed to the actual trial, it is not controlling.[5] (Cf. *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at p. 388, fn. 19.) Post *Mercury-News* treatment of the issue by the federal circuit courts emphasizes the dichotomy between the preliminary hearing and other pretrial proceedings. Although there are cases where the federal courts have found a First Amendment right of access to certain pretrial proceedings, the result was obtained through an analogical comparison to a trial. Petitioner has not cited, nor have we found, any decision which extended the access right to preliminary hearing. Indeed, preliminary hearings are to be distinguished from rather than analogized to trials. (See *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at p. 437 (conc. & dis. opn. of Blackmun J.); *United States* v. *Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1167 and cases decided therein. See also *United States* v. *Criden* (3d Cir. 1982) 675 F.2d 550, 557 (distinguishing *Mercury-News*).)

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[5]In a concurring opinion Justice O'Connor stated that she did not interpret *Richmond Newspapers* "to shelter every right that is 'necessary to the enjoyment of other First Amendment rights.' [Citation.] . . . Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials." (*Globe Newspaper Co.* v. *Superior Court, supra,* 457 U.S. at p. —— [73 L.Ed.2d at p. 260], emphasis added, conc. opn. of O'Connor, J.)

Although *Mercury-News* did not consider whether the public has a constitutional right of access to transcripts, logic dictates a reapplication of the preliminary hearing analysis. Accordingly, since there is no right of public access to preliminary hearings arising under either the federal or state Constitutions (*Mercury-News, supra,* 30 Cal.3d at pp. 506-508), there is no constitutional right to transcripts of such hearings.

II. Penal Code Section 868: A Statutory Right of Access

The principal changes accomplished by the 1982 amendment to section 868 are that the section now requires that the preliminary hearing shall be open and public, and it will only be closed when necessary in order to protect the defendant's right to a fair and impartial trial.[6] Prior to the amendment, closure was mandatory if requested, and no finding of necessity was required. (See Note, Criminal Procedure (1983) 14 Pacific L. J. 581, 583-584.) Petitioner contends that this amendment has the effect of granting the public a right of access to preliminary hearings and the transcripts thereof. We agree.

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[6]Section 868, as amended, reads in pertinent part: "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, prosecutor and his or her counsel, the Attorney General, the district attorney of the county, . . ." (Stats. 1982, ch. 83, § 3 [operative March 1, 1982].)

Before the 1982 amendment section 868 read in pertinent part: "The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, court reporter and bailiff, the prosecutor and his counsel, the Attorney General, the district attorney of the county, . . ." (Stats. 1976, ch. 1178, § 2.)

Diaz' preliminary hearing commenced on July 6, 1982, over four months after the operative date of the 1982 amendment.

In *Mercury-News* the court stated the Legislature could properly accommodate competing free-speech and fair-trial interests. (*Mercury-News*, supra, 30 Cal.3d at p. 514.) The Legislature responded by amending section 868, effective March 1, 1982, about six weeks after the *Mercury-News* decision.

In apparent reference to the *Mercury-News* decision, the Legislature stated: "This act is an urgency statute. . . . [¶] The absence of clear legislative guidance has resulted in confusion concerning the access of the public and other parties to criminal proceedings. . . . Therefore, in order to clarify the rights of the public and others to know about the workings of our criminal justice system, it is necessary that this act become effective immediately." (2 West's Cal. Legl. Service (1982) pp. 394-395.) Since the Legislature has power to determine the rights of individuals, provided there is no interference with constitutional guarantees (*Modern Barber Col.* v. *Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 726), we conclude that a right of public access to preliminary hearings arises under section 868. This right of access extends to transcripts produced from preliminary hearings. (Compare *United States* v. *Brooklier, supra,* 685 F.2d at p. 1172 [denial of motion to release transcript was tantamount to a denial of right of access].)

III. Closure upon Necessity: A Balancing Approach

Petitioner asserts that the language of necessity in section 868 requires the application of the closure test adopted by the Ninth Circuit in *United States* v. *Brooklier, supra,* 685 F.2d 1162. This test, derived from the *Gannett* dissent (*Gannett Co.* v. *DePasquale, supra,* 443 U.S. at pp. 441-442 [conc. & dis. opn. of Blackmun, J.]), would require a defendant to establish that closure of his preliminary hearing is strictly and inescapably necessary in order to protect his fair trial guarantee. Under this standard a defendant must demonstrate: "(1) 'a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public'; (2) 'a substantial probability that alternatives to closure will not protect adequately his right to a fair trial'; and (3) 'a substantial probability that closure will be effective in protecting against the perceived harm.'" (*United States* v. *Brooklier, supra,* 685 F.2d at p. 1167.)

The *Mercury-News* decision provides some guidance in developing an appropriate test. The court considered this issue in terms of the positive and negative aspects of an open preliminary hearing. In relating the beneficial value of an open preliminary hearing, the court recognized it may be the only time a judicial proceeding of importance occurs during a criminal prosecution, and therefore, the preliminary hearing would provide the sole opportunity for public observation of the criminal-justice system.

However, the court also noted that the nature of preliminary hearings presents danger that public access may prejudice a defendant's right to a fair trial. "As with other pretrial proceedings, the climate [preliminary hearings] may generate in advance of trial cannot always be nullified by relatively simple controls, such as sequestration and exclusion of witnesses, that are available to counter inflammatory publicity at the time of trial." (*Mercury-News, supra,* 30 Cal.3d at p. 511.) "Prejudice at times may be acute because of the superficial resemblance between preliminary hearing and trial. [Citation.] The distinct functions served by the two proceedings are not always clear to nonlawyers. They may ascribe to a one-sided preliminary hearing the legitimacy and credibility of a trial. Accordingly, a defendant denied the protection of section 868 might feel compelled to abandon his right of silence at the hearing and to embrace a tactic of trying the case in the media." (*Mercury-News, supra,* 30 Cal.3d at p. 512.) Further, due to the timing of a preliminary hearing, a defendant will frequently find it difficult to show that prejudice is likely

and closure is justified. "The evidence required may not be available at an early stage, when community reaction and the media's attitude are not clear. Moreover, defendant may have little knowledge before the hearing of the prosecution's strategy and evidence. That additionally clouds his ability to prove the value to him of closure." (*Mercury-News*, *supra*, 30 Cal.3d at p. 513, fn. omitted.)

Although, by amendment of section 868, the Legislature intended to clarify the right of public access to preliminary hearings, there is no indication that the Legislature intended to encroach upon the rights of defendants to receive a fair trial. Section 868 expressly requires closure of the hearing if the court finds that right endangered. Therefore, the comments of the court in *Mercury-News* describing the prejudicial effect of certain pretrial publicity are germane to any consideration of the standard to be used in implementing section 868 as amended.

We conclude that the *Brooklier* test is inappropriate as a standard for closure under section 868. The *Brooklier* test was formulated in deference to the public's *First Amendment* right of access to *voir dire* proceedings and actual trials. (See *United States* v. *Brooklier*, *supra*, 685 F.2d at p. 1167.) Even in the constitutional context, Justice Powell in *Gannett* stated that the *Brooklier* test (as contained in his brethren's dissent) would not adequately safeguard defendant's right to a fair trial. "A rule of such apparent inflexibility could prejudice defendants' rights and disserve society's interest in the fair and prompt disposition of criminal trials." (*Gannett Co.* v. *DePasquale*, *supra*, 443 U.S. at p. 399 [conc. opn. of Powell, J.].) The right of access at a preliminary hearing is conferred by statute. This difference in the source of the right being asserted, as well as the greater difficulty in showing prejudice at the preliminary stage, mandate the application of a more flexible standard.

In *Cromer* v. *Superior Court* (1980) 109 Cal.App.3d 728, 733-734, the court held that the appropriate standard for insuring the accused a fair trial under the threat of adverse pretrial publicity is whether there is a "'reasonable likelihood' of substantial prejudice. [Citation.]" The court also noted that a defendant is entitled to "'receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial court must take strong measures to ensure that the balance is never weighed against the accused.*'" (Original italics.) (*Cromer* v. *Superior Court*, *supra*, 109 Cal. App.3d at pp. 731-732, quoting *Sheppard* v. *Maxwell* (1966) 384 U.S. 333, 362 [16 L.Ed.2d 600, 620, 86 S.Ct. 1507].)

Heretofore the crucial component lacking in section 868 cases was the requirement that the lower court apply a balancing test before closing a preliminary hearing. Although in *Mercury-News* the court pointed out that a balancing approach would be difficult to apply with respect to preliminary hearings because of the early stage of development of the case, the court also recognized that in many instances concerns may be amenable to judicial balancing on a case-by-case basis and the Legislature had the power to accommodate these interests. (*Mercury-News*, *supra*, 30 Cal.3d at p. 514) The amendment clearly states that the requirement of an "open and public" preliminary hearing shall yield upon the defendant's request *and* a finding that exclusion is necessary to protect the defendant's right to a fair and impartial trial. Thus, in section 868 the legislature has provided a framework for such a case-by-case analysis. We conclude that a preliminary hearing must be closed at defendant's request if, after balancing the competing interests, the court finds a reasonable likelihood of substantial prejudice which would impinge on the defendant's right to a fair trial.

In making its determination the court should consider: (1) the extent and prejudicial impact of past media coverage; (2) the likelihood and degree of prejudicial impact resulting from media coverage of the impending preliminary hearing; (3) the relative size of the prospective jury pool; (4) the efficacy of closure as a means of protecting the defendant's right to a fair trial; and (5) the existence of viable alternatives. (See generally, *Nebraska Press Assoc.* v. *Stuart* (1976) 427 U.S. 539, 562-563 [49 L.Ed.2d 683, 699-700, 96 S.Ct. 279] (speculating on the existence of prospective prejudice was proper); *Mercury-News, supra,* 30 Cal.3d at p. 512-513.) Additionally, since the court must stay open to balancing the two competing interests, prudence suggests that it remain receptive to reasonable arguments advancing other relevant factors.

What constitutes a viable alternative in lieu of closure may differ with each case. The court should consider any alternative which would still protect the defendant's right to a fair and impartial trial. (See generally, *Gannett Co. v. DePasquale, supra,* 443 U.S. at pp. 441-442 [conc. & dis. opn. of Blackmun, j.]; *Brian W.* v. *Superior Court* (1978) 20 Cal.3d 618, 625.) Restraints on publication are generally not viable because they impose an equal, or often greater, restraint than closure on First Amendment rights. (*Mercury-News, supra,* 30 Cal.3d at p. 513.) Finally, a change of venue or postponing the trial until the effect of pretrial publicity subsides, are usually not viable because they may subject the parties to great inconvenience, while possibly violating a defendant's right to a speedy trial in the vincinage.[7]

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[7]Diaz filed a response to the order to show cause contained in the alternative writ. (Cal. Rules of Court, rule 56(c).) As Diaz correctly notes, his right to a speedy trial in the vicinage has common law and constitutional antecedents. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; *People* v. *Jones* (1973) 9 Cal.3d 546, 556.) "[A] defendant has a right to have his case tried in the place of his residence, and no change of venue can be forced down his throat by publicity in the press. [Citation.]" (*Rosato* v. *Superior Court* (1975) 52 Cal.App.3d 190, 210, cert. den., 427 U.S. 912 [49 L.Ed.2d 1204, 96 S.Ct. 3200].)

Because a denial of a preliminary hearing transcript is also a denial of a right of access protected by section 868, it must be tested by the same standards and satisfy the same requirements as the initial closure. (Cf. *United States v. Brooklier, supra,* 685 F.2d at p. 1172.) Moreover, even when a transcript has been properly sealed, it must be released upon a proper showing that a reasonable likelihood of substantial prejudice to the defendant's right to a fair trial no longer exists.

IV. Propriety of the Lower Courts' Orders

The magistrate granted the motion to close the preliminary hearing relying on *Gannett.* The magistrate found that due to pretrial publicity, and the general nature of preliminary hearings, only the prosecutorial side of defendant's case would be reported in the media. Because there was no objection to the closure at the preliminary hearing, the record does not reveal whether the court considered the competing rights of public access or the existence of viable alternatives prior to closure. However, it is apparent that the court found a reasonable likelihood of substantial prejudice and granted the closure motion to protect Diaz' right to a fair and impartial trial.

We turn now to the order sealing the transcript. Petitioner contends that the superior court failed to state any reasons or make a specific finding to support the sealing order as required by section 868; the court sealed the transcript based on an insufficient showing of possible prejudice; and the court failed to consider any alternatives.

A review of the record of the hearing on petitioner's request for access to the transcript reveals that the court considered Diaz' right to a fair trial and concluded that there was "a reasanable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." The court did not specifically state on record that this right was considered in light of the countervailing access rights of the public. However, it is clear that the court recognized the existence of the right of access but determined that the probability of prejudice to Diaz' right to a fair and impartial trial continued as long as the matter remained set for a jury trial.

Petitioner and amicus curiae contend that the order sealing the transcript should be vacated for the following reasons: (1) the media coverage has been factual and therefore of a nonprejudicial nature (2) since the evidence adduced at the preliminary hearing was neither inflammatory nor sensational it is not likely to lead to extensive media coverage at this time; (3) the testimony is free from potentially inadmissible evidence and confessions; (4) any evidence about the preliminary hearing is likely to be forgotten before trial; (5) media coverage has been declining significantly since the time Diaz was first charged with murder; and (6) the transcript can be selectively released deleting the prejudicial portions.

Diaz maintains, however, that (1) release of the transcript would significantly impair his right to be tried by an impartial jury selected from Riverside County (2) the preliminary hearing testimony is subject to evidentiary attack at trial; (3) some of the municipal court's comments were prejudicial; (4) media coverage has been extensive in general; and (5) a venue study reveals that he could still get a fair trial in Riverside County largely due to the superior court's protective order.

Balancing the competing interests leads to the conclusion that the trial court acted properly in ordering the transcript sealed. For the reasons which follow, we hold that the trial court could properly conclude that releasing the transcript, as long as the case remains set for a jury trial, would create a reasonable likelihood of substantial prejudicie to Diaz' right to a fair trial.

This case has been the subject of intense media coverage for over two years. A substantial amount of this coverage occurred before Diaz was arrested in November of 1981. Most of the articles before his arrest contained a common theme of suspicion and implication. Diaz was frequently questioned by the media concerning his possible involvement. Some of the articles depicted the details of suffering which the victims endured before their death. An article covering Diaz' arrest displays a photograph of him in handcuffs and police custody. After the transcript was sealed, newspaper coverage declined.

Petitioner is in error in suggesting that factual evidence cannot be prejudicial. Petitioner directs this court to *Mercury-News, supra,* 30 Cal.3d at p. 512 and asserts that the court stated that if the evidence is factual and not inflammatory or sensational, then it cannot be said that publication of this information would necessarily produce a jury pool within which the defendant's guilt has already been ascribed.

The opinion actually states: "Yet inflammatory or misleading publicity is not the only unfair publicity. Factual, relevant reporting may be prejudicial too if it produces a jury pool within which a defendant's guilt has already been ascribed." (*Mercury-News, supra,* 30 Cal.3d at p. 512.) While it is true that factual reporting does not invariably lead to prejudice, as *Mercury-News* stated, such reporting can be prejudicial because it may produce a jury pool in which defendant is presumed guilty. This principle is applicable here. Moreover, apart from (but related to) this

principle, the transcript is indicative of only the prosecutorial side of the case, bringing to mind many of the other concerns expressed in *Mercury-News*. Our examination of the transcript convinces us that even factual dissemination of its contents would result in public awareness of potentially inadmissible evidence and prejudicial comments. Were this to occur, the exclusion of such evidence in court during the trial would be rendered meaningless. (See *Sheppard v. Maxwell, supra*, 384 U.S. at p. 360; *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 877-878.) Additionally, petitioner's contention that such evidence would be forgotten is not persuasive with Diaz' trial just weeks away at the time of this hearing.

The transcript consists of 47 volumes, 4,239 pages, spanning 8 weeks of testimony. The sheer volume of the transcript suggests that its release would generate substantial media coverage. Although petitioner argues that the more severe danger of "day-to-day" reporting has now passed with the conclusion of the preliminary hearing, there is nothing to prevent the press from bringing about its recurrence. Further, any coverage would have the effect of renewing questions about Diaz' involvement, thereby reopening the pre-arrest publicity.

Alternatives to sealing the transcript would not suffice in this case. Citing *Associated Press* v. *U. S. Dist. for C.D. of Cal.* (9th Cir. 1983) 705 F.2d 1143, petitioner suggests the use of clear and emphatic jury instructions and an intensive *voir dire* as alternatives to sealing the transcript. However, in that case these measures were found practicable in a large urban area. Relying on *Nebraska Press, supra*, 427 U.S. 539, *Associated Press* stated in a large urban area such as Los Angeles, there are millions of potential jurors, and these alternatives will screen out those with fixed opinions regarding the defendant's guilt or innocence. (*Associated Press* v. *U.S. Dist. Ct. For C.D. of Cal., supra*, 705 F.2d at p. 1146.) Since the population in Riverside County is substantially smaller, these alternatives

would be less effective. The release of the transcript and employment of these alternatives would tend to exacerbate the existing prejudice. (See *Cromer* v. *Superior Court, supra,* 109 Cal.App.3d at p. 735.)

A change of venue would not only impinge on Diaz' constitutional right to be tried by a Riverside County jury, but would also subject many people to great inconvenience. Postponement would delay what has been projected to be the longest criminal trial in Riverside County history while possibly violating Diaz' right to a speedy trial. Finally, we reject petitioner's contention that selective release of the transcript is indicated. Even if the administrative burden of such a task could be overcome, the selective release would be impossible in view of the overall tone of the transcript.

The public's right of access to preliminary hearings and transcripts under section 868 is an important interest which should only be denied when there is a reasonable likelihood of substantial prejudice to a defendant's fair-trial rights. There was such reasonable likelihood as long as this case awaited a jury trial.

DISPOSITION

The alternative writ of mandate is discharged; the peremptory writ is denied.

CERTIFIED FOR PUBLICATION

MORRIS
P.J.

We concur:
KAUFMAN
J.

MC DANIEL
J.

No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM 1984

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS.

ROBERT RUBANE DIAZ,
Defendant.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Respondent Superior Court of the State of California for the County of Riverside respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the Supreme Court of the State of California's decision in this case. That decision is reported at 37 Cal.3d 772.

REASONS FOR DENYING THE WRIT

I.

AS CALIFORNIA STATUTORILY RECOGNIZES A PUBLIC RIGHT OF ACCESS TO PRELIMINARY HEARINGS, THERE IS NO NEED TO GRANT CERTIORARI TO DETERMINE IF THERE IS ALSO A CONSTITUTIONAL RIGHT OF ACCESS.

The first Question Presented in the Petition is whether the public's constitutional right of access to criminal proceedings extends to preliminary hearings. Petitioner asserts that since this Court's decision in *Gannett Co. v. DePasquale* (1979) 443 U.S. 368 "considerable uncertainty" exists as to whether there is a First Amendment right of access to pretrial proceedings and that the time is ripe to resolve the issue. (Petition, p. 5.) However, this is the wrong case to test the issue.

California already recognizes the public's right of access to preliminary hearings. California Penal Code Section 868, as amended, specifically states that "the examination shall be open and public" and that the public can be excluded only when the magistrate finds that closure "is necessary in order to protect the defendant's right to a fair and impartial trial." Although the California Supreme Court did not find the right of access to be of constitutional derivation, it did find that Section 868 does establish a statutory right of access to preliminary hearings. (*Press-Enterprise v. Superior Court* (1984) 37 Cal.3d at 777).

Certainly, the California Supreme Court's decision has not deprived either the press or the public of the right of access to preliminary hearings: the only difference lies in the fact that Petitioner would prefer to see the right characterized as of constitutional dimension rather than solely statutory. But this Court has consistently held that

it will not pass upon constitutional questions if there is another ground on which the case may be disposed. *Escambia County v. McMillan* (1984) ____ U.S. ____, 80 L.Ed.2d 36; *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 347 (Brandeis, J., dissenting). Here, the right which Petitioner seeks to protect, the right of access to preliminary hearings, has been guaranteed. The fact that the California Court rejected the constitutional argument does not augur for certiorari since a ruling on that issue will not affect the public's right of access in California one way or the other. Petitioner's argument for a constitutional determination on this issue is, therefore, unpersuasive.

II.

THE FACTS OF THE PRESENT CASE ARE SO UNCOMMON AS TO RENDER IT AN INAPPROPRIATE SUBJECT FOR CERTIORARI.

While a substantial portion of the Petition is devoted to perceived inconsistencies among various rulings in several states on the issue of the public's right of access to pre-trial proceedings, the facts underlying this Petition are such as to preclude the adoption of a uniform rule.

The sole ground upon which a magistrate may close a preliminary hearing under California Penal Code Section 868 is in order to protect the defendant's right to a fair and impartial trial. Indeed, this Court has held squarely that "no right ranks higher than the right of the accused to a fair trial" (*Press-Enterprise v. Superior Court* (1984) ____ U.S. ____, 78 L.Ed.2d 629, 637) and that in certain circumstances even the public's First Amendment right of access must bow to this Sixth Amendment right. (*Gannett Co. v. DePasquale, supra.*)

Here, the magistrate who closed the hearing and sealed the transcript, and later the trial judge who continued the sealing order, acted in a way to insure the Defendant's right to a fair and impartial jury, and hence, a fair and impartial trial. However, in what can be considered a most uncommon, if not rare occurrence in a trial involving death penalty potential, Defendant Diaz ultimately waived his right to a jury trial and thereafter the preliminary hearing transcript was released. (Petition, p. 3, n. 2.)

The Defendant's waiver of a jury trial reduces this case to an *in vitro* situation inviting highly speculative, even imaginative determinations as to what effect pre-trial publicity might have had if the preliminary hearing had not been closed, upon a venire which was never actually assembled. And while a trial judge may be put to a similar task in determining whether or not to close a preliminary hearing, his decision is made in an *in vivo* situation, ultimately affecting only the case presently before him. However, the construction of a uniform rule of law based upon such speculation as would be required here, is quite another matter.

In the *Diaz* case, there were no jurors who could have been purveyed after the trial, nor is there a record of a *voir dire* examination of potential jurors from which any assessment of the effect of pre-trial publicity in this case could be made. Thus, the absence of a jury coupled with the unsealing of the preliminary hearing transcript at a time when the reason for its having been sealed had been vitiated, provides this Court with little more than an abstraction in terms of the factual aspects of this case and the formulation therefrom of a uniform rule of law susceptible of ready application to preliminary hearings generally.

III.

THIS COURT SHOULD NOT REVIEW THE PROCEDURAL RULE BY WHICH CALIFORNIA COURTS DETERMINE WHEN A PRELIMINARY HEARING SHOULD BE CLOSED.

The second Question Presented in the petition is whether the standard for closure under California Penal Code Section 868, a matter of state statutory interpretation, violates the asserted constitutional right of public access to preliminary hearings. Although "petitioner recognizes that this normally would be simply a matter of statutory interpretation, not reviewable by this Court" (Petition, p. 12), it attempts to justify the raising of the issue in this Court by arguing, speculatively, that the standard is "loose" and may allow in the future the closing of preliminary hearings when it is not essential to the preservation of a defendant's fair trial right. But this argument is an insufficient ground on which to justify the granting of certiorari.

Section 868 allows a preliminary hearing to be closed only when there is a necessity to protect a defendant's right to a fair trial. The California statute is directly in conformance with previous decisions of this Court which emphasize that courts should be open and that openness should bow only when higher values, such as a right to a fair trial, are to be served. All that the California Supreme Court has done is set forth a procedure by which a magistrate shall take evidence to determine whether there is a necessity for closure. The articulated standard of a "reasonable likelihood of substantial prejudice" is simply the first step. The press and the public then have the right to overcome the defendant's showing, and can raise all of the issues at that time.

The concurring opinion of Justice Grodin in *Press-Enterprise v. Superior Court* (1984) 37 Cal.3d 772 at pp. 782, 783, provides a succinct answer to the question raised by Petitioner: . . . "I agree with the majority that by its amendment to section 868 the Legislature has decided that open preliminary hearings should be the 'rule rather than the exception' (citation omitted), the exception existing only when exclusion of the public is, to use the language of the statute, 'necessary in order to protect the defendant's right to a fair and impartial trial.'

I agree also that the determination of 'necessity' must inevitably be a matter of judgment based upon probabilities, and that the phrase 'substantial showing of potential prejudice' (or, what amounts to the same thing, a 'reasonable likelihood of substantial prejudice') constitutes a fair description of the requisite assessment. I do not believe that the First Amendment would require more than that."

CONCLUSION

The public has a right of access to preliminary hearings in California, and the decision by the California Supreme Court in this case does not in any way deprive the public of that right. Although the press would like to see answered the question left open in *Gannett Co. v. DePasquale*, the issue is not ripe here. There is no live and meaningful constitutional controversy when the right asserted is specifically protected. Simply stated, the instant case does not present the Court with a clear constitutional question which must be answered, and thus the Petition for Writ of Certiorari should be denied.

Dated: June 18, 1985

Respectfully submitted,

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No. 84-1560

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VS.

ROBERT RUBANE DIAZ,
Defendants.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Filed on Behalf of the Copley Press, Inc.; The Associated Press; Los Angeles Times, a division of Times Mirror Company; John P. Scripps newspaper group; California Freedom of Information Committee; San Jose Mercury News; The Sun Co.; San Francisco Examiner; California Newspaper Publishers Association, Inc.; National Broadcasting Company, Inc. (NBC); The Radio & Television News Association of Southern California; California Society of Newspaper Editors; The East Bay Press Club; Sparks Newspapers; McClatchy Newspapers; Radio-Television News Directors Association NorCal and San Francisco Chronicle

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICI CURIAE

Amici respectfully submit this Brief of Amici Curiae in support of the petition for a writ of certiorari.[1] Amici regularly report on criminal proceedings throughout California.

[1]Pursuant to Rule 42, the written consent of the parties is filed concurrently with this brief.

The Closures Are Frequent and Statewide.

The deprivation of First Amendment rights Petitioner identifies is not limited to the *People v. Diaz* case[2] nor to the people of Riverside County. Closure of criminal proceedings occurs frequently throughout California, affecting the rights of the public and the press across the state. Since the California Supreme Court has now held, in the *Diaz* case, that the public has *no First Amendment* right to attend criminal preliminary hearings, California trial judges have been closing these criminal proceedings with increasing frequency.

The Preliminary Hearing Is a "Critical Stage" of the Criminal Process.

Such closures cause an immediate and irremediable loss of the public's First Amendment right to attend a "critical stage" of a criminal trial.[3] Issues crucial to the criminal justice process (for example, objections to police misconduct, suppression of evidence, cross-examination of witnesses, confrontation of accusers, application of rules of evidence, impartial judicial presence, right to call defense witnesses, representation by counsel) are part of the preliminary hearing. Repeated statewide closure undermines Amici's ability to fulfill their public responsibility to report on such issues.

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[2]The petition arises from the California Supreme Court decision in *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d 772, 691 P.2d 1026, 209 Cal.Rptr. 360 (1984); the underlying criminal case was *People v. Diaz* (L.A. No. 31876). To avoid confusion between the Court's decision, *Press-Enterprise Co. v. Superior Court*, 464 U.S. ____, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) and the California Supreme Court decision that is the subject of this petition, Amici will refer to the California case as *Diaz*.

[3]*Hawkins v. Superior Court*, 22 Cal.3d 584, 588, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

Only the Court Can Protect the Public's Right.

Neither the Court's decision in *Press-Enterprise Co. v. Superior Court*, 464 U.S. ____, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), nor the clear and unanimous statement of the Courts of Appeals[4] that the public has a right to attend pretrial criminal proceedings mean anything in California in the wake of the *Diaz* holding that no First Amendment right of access exists. Because of the *Diaz* decision, Amici and the people of California have no avenue of redress unless the Court grants the petition and hears this case on its merits.

The Amici

The Copley Press, Inc. publishes five daily newspapers in California — *The San Diego Union, The Tribune, The Daily Breeze, The News-Pilot,* and *The Santa Monica Evening Outlook* — whose combined circulation is more than 450,000 copies daily.

The Associated Press is a membership nonprofit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1,240 member newspapers and its 5,600 member broadcast stations throughout the United States, and to other publishers throughout the world.

Los Angeles Times, a division of the Times Mirror Company, is the largest daily newspaper in California, and has a general daily circulation of more than one million copies.

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[4]*Application of the Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *Associated Press v. U.S. Dist. Ct. For C.D. of Cal.*, 705 F.2d 1143 (9th Cir. 1983); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982).

The John P. Scripps newspaper group is an affiliation of locally independent newspapers in California.

California Freedom of Information Committee is a nonprofit organization formed by and representing the journalism profession of California. Its membership consists of working press, both print and broadcast, educators, various press clubs, chapters of the Society of Professional Journalists — Sigma Delta Chi, The California Newspaper Publishers Association, and The California Broadcasters Association. Among its purposes are to represent the public at large on the subject of freedom of information and to protect, on behalf of the public, against all efforts to impose restraints against the flow of information to which the public is entitled.

The *San Jose Mercury News* is a Knight-Ridder Newspaper whose circulation covers Santa Clara County and the remaining San Francisco Bay Area.

The Sun Co. of San Bernardino publishes a general circulation newspaper in all portions of San Bernardino County with a total circulation of 80,000 daily.

The *San Francisco Examiner* is a newspaper of general daily circulation in the San Francisco Bay Area and elsewhere in Northern California. Its daily circulation is estimated to be in excess of 150,000 and its readership is substantially larger.

The California Newspaper Publishers Association, Inc., a nonprofit mutual benefit association, comprises a membership of a majority of the state's daily and weekly newspapers of daily circulation.

National Broadcasting Company, Inc. (NBC) provides programming, including news, for broadcast by owned and affiliated television stations throughout the country. NBC's

news department continually covers pretrial and trial proceedings in criminal cases.

The Radio & Television News Association of Southern California is an organization of radio and television stations whose members regularly cover criminal proceedings in California.

The California Society of Newspaper Editors is a professional society of newspaper editors organized to promote professional excellence and dedicated to upholding the First Amendment rights of their members.

The East Bay Press Club is an organization of journalists and editors who brought the first constitutional suit to California Penal Code Section 868 challenging the closure of preliminary hearings.

Sparks Newspapers is a publisher of various daily and weekly newspapers, including *The Daily Review, The Argus, The Tri-Valley Herald,* and *The San Ramon Valley Herald.*

McClatchy Newspapers is a communications company with seven daily and three nondaily newspapers in California, Washington and Alaska, having a total circulation in excess of 500,000.

Radio-Television News Directors Association NorCal is a nonprofit organization representing news directors in Northern California from the broadcast media.

The *San Francisco Chronicle,* a division of the Chronicle Publishing Co., is a daily newspaper published in San Francisco, California with a daily circulation of 540,000 and a Sunday circulation of 705,625. The Chronicle Broadcasting Co., a wholly owned subsidiary of Chronicle Publishing Co., operates three television stations.

I

SUMMARY OF ARGUMENT

A. The Problem Affects All of California.

California courts continue to deny the public its right to attend pretrial criminal proceedings in general, and preliminary hearings in particular.[5] The California Supreme Court's decision, *Press-Enterprise Co. v. Superior Court,* 37 Cal.3d at 777, 691 P.2d 1026, 209 Cal.Rptr. 360 (the *Diaz* case), exacerbates the problem by stating that the public has no First Amendment right to attend preliminary hearings.[6] Since *Diaz,* preliminary hearings in California have been routinely closed, often with no evidence of

[5]*See Telegram-Tribune, Inc. v. Municipal Court,* 2d Civ. No. 69594 (Cal. Ct. of App., 2d Dist., Div. Six); *Newberry v. Justice Court of San Benito County,* AO 24819 (Cal. Ct. of App., 1st Dist., Div. Five); *Sacramento Bee v. Municipal Court,* 3 Civ. No. 23658 (Cal. Ct. of App., 3d Dist.); *People v. Sanchez, et al.,* San Diego County, CR No. F77211; *People v. Mack,* San Diego County, CR No. ——.

[6]In spite of this Court's 1984 decision, *Press-Enterprise Co. v. Superior Court,* 464 U.S. ——, 104 S.Ct. 819, 78 L.Ed.2d 629, the California Supreme Court in the *Diaz* case simply reaffirmed a position taken earlier, *San Jose Mercury-News v. Municipal Court,* 30 Cal.3d 498, 506, 638 P.2d 655, 179 Cal.Rptr. 772 (1982), which held the public had no such First Amendment right. Just six weeks after the *San Jose Mercury-News* decision, the California Legislature responded by amending California Penal Code Section 868, the statute concerning the public's right to attend preliminary hearings, to read that such hearings could only be closed to the public when "*necessary* in order to protect the defendant's right to a fair and impartial trial. . . ." California Penal Code § 868 (operative March 1, 1982) (Deering 1983) (emphasis added). Amici suggest that Penal Code § 868, as amended, if properly applied meets the constitutional safeguards of the First and Sixth Amendments. The California Supreme Court's *Diaz* decision, however, not only vitiates the statutory provision but also creates a standard that abuses First Amendment rights.

prejudice to the defendant's fair trial right, no articulated findings of fact, and based on an unsubstantiated recitation "reasonable likelihood of substantial prejudice."[7]

B. The Preliminary Hearing Is a "Critical Stage" of the Criminal Process.

The California Supreme Court has repeatedly stated that the preliminary hearing is a "critical stage" of the criminal process, *Hawkins v. Superior Court,* 22 Cal.3d at 588, 586 P.2d 916, 150 Cal.Rptr. 435, and the preliminary hearing is the only hearing of substance in most criminal cases, *San Jose Mercury-News v. Municipal Court,* 30 Cal.3d at 511, 638 P.2d 655, 179 Cal.Rptr. 772. Nonetheless, the public is routinely excluded.

C. Diaz Disregards the Court's Decisions.

The Court has consistently affirmed the public's First Amendment right to observe their judicial system in operation. *Press-Enterprise Co. v. Superior Court,* 464 U.S. ——, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

Diaz, and its application by trial courts, refuses to recognize the clear thrust of these decisions. Because California trial and appellate courts regularly disregard the public's right to attend and the press' responsibility to report criminal preliminary hearings, Amici respectfully request the Court to grant the petition, overturn the California Supreme Court's *Diaz* decision and establish a strict stan-

[7]Cases in which Amici have participated in the four months since the *Diaz* case, in San Diego County alone, in which the preliminary hearing has been closed include: *People v. Lucas,* San Diego County, CR No. F89006; *People v. Troiani,* San Diego County, CR No. H03859.

dard, arising under the First Amendment, to insure the public's right of access to preliminary hearings.

II

THE CALIFORNIA SUPREME COURT CONTRADICTS THIS COURT'S DECISIONS.

In the *Richmond Newpapers, Globe Newspaper* and *Press-Enterprise* cases, the Court has kept the criminal process open to public scrutiny. In each case, the Court looked to history and policy to conclude that the public has a First Amendment-based right to be present at criminal judicial proceedings.

The history of preliminary hearings in the United States supports open hearings. Most states conduct open preliminary hearings. In only six states, including California, all of which adopted the Field Code, is closure permitted. The Field Code provisions authorizing such closure, however, until recently, have been "in judicial dormancy and day-to-day disuse." Geis, *Preliminary Hearings and the Press*, 8 UCLA L.Rev. 397, 407 (1960-61). Accordingly, even though a few jurisdictions have laws on the books allowing closed preliminary hearings, the practice has been for the hearings to be public. Geis, *Preliminary Hearings and the Press, supra*. Furthermore, in California, after the Court's *Richmond Newspapers* decision, and in response to the California Supreme Court's *San Jose Mercury-News* decision, the California Legislature changed the Field Code provision to permit a preliminary hearing to be closed only when *necessary* in order to protect a defendant's fair trial right. California Penal Code Section 868, as amended 1982 (Deering 1983). The *Diaz* case disregards this legislative mandate.

Policy also supports open preliminary hearings. The Court has acknowledged the importance of public review

of the actions of all branches of government, including all phases of the criminal justice process. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604-606, 102 S.Ct. 2613, 73 L.Ed.2d 248; *Nebraska Press Asso. v. Stuart*, 427 U.S. 539, 559-561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

The Court has identified four benefits from criminal proceedings:

1. Public scrutiny improves the quality of the proceeding;

2. Public access increases public understanding of the criminal justice system;

3. Public access fosters public confidence in the system; and

4. Public access contributes to a fuller community catharsis. *Press-Enterprise Co. v. Superior Court*, 464 U.S. ——, 104 S.Ct. at 823-824, 78 L.Ed.2d 637-638.

Each applies with equal force to public access to a preliminary hearing. In California, the preliminary hearing is a "critical stage" of the criminal process. *Hawkins v. Superior Court*, 22 Cal.3d at 588, 592-593, 586 P.2d 916, 150 Cal.Rptr. 435. Activities that typically occur at trial also occur at the preliminary hearing; each side has an incentive to prevail; the defendant is represented by counsel, prosecution witnesses are cross-examined; the defendant can call witnesses on his or her behalf; and, all the evidence is heard by a neutral magistrate. The right of public access to the preliminary hearing in California is just as important as the right of public access to trial. In many cases, the public's only opportunity to observe the criminal justice system at work is at the preliminary hearing. The overwhelming number of felony cases are disposed of without trial. *San Jose Mercury-News*, 30 Cal.3d at 511, 638 P.2d 655, 179 Cal.Rptr. 772 citing California Department of Justice, *Crime and Delinquency in Californi., Part II*, 10.

Public access to the preliminary hearing improves its quality just as public access to trial benefits that process. Public access adds assurance that the proceedings are conducted fairly to all concerned; it discourages perjury, the misconduct of participants, and prevents decisions based on partiality. As the Court recognized, "Without publicity, all other checks are insufficient . . . ." (Citation omitted.) *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 569, 100 S.Ct. 2814, 65 L.Ed.2d 973.

Access to preliminary hearings increases public understanding of the criminal justice system. The public must understand how its system operates; that understanding cannot be realized if the public does not have a constitutionally based right to attend the only hearing that occurs in the vast majority of California felony cases.

Substantial constitutional issues, for example, suppression questions, are decided at the preliminary hearing. Graham and Letwin, *A Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations,* 18 UCLA L.Rev. 916 944-945 (1971). When preliminary hearings are held behind closed doors, decisions on important constitutional questions are made in secret. At a time when the public is questioning court decisions allowing suppression of evidence, and other constitutional safeguards for criminal defendants, the public has a right to see the application of those safeguards in particular cases.

Preliminary hearings also involve objections to the propriety of police conduct. *See* California Penal Code Section 1538.5 (Deering supp. 1985). In fact, the preliminary hearing can be the only point in the criminal process at which public conduct is put under public scrutiny. *Richmond Newspapers v. Virginia,* 448 U.S. at 570-573, 100 S.Ct. 2814, 65 L.Ed.2d 973. Because that conduct occurs outside the public view, beneficial public scrutiny never takes place

if access to the preliminary hearing is not given constitutional protection.

Public access to preliminary hearings also fosters public confidence in the system:

> "[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise,* 464 U.S. ___, 104 S.Ct. at 823, 78 L.Ed.2d at 637.

Access to preliminary hearings is as important as access to trial. It enhances public confidence in the criminal justice system by demonstrating that established due process procedures are followed even at the preliminary stages of the criminal case. Furthermore, the fact that closed hearings may be fairly conducted does not enhance the public's confidence in the system if the public is not allowed to see the hearing:

> "Secret hearings — though they be scrupulously fair in reality — are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Cianfrani,* 573 F.2d 835, 851 (3d Cir. 1978).

Finally, public access to preliminary hearings creates a community catharsis.

> "When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would

deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct . . ." *Press-Enterprise,* 464 U.S. ____, 104 S.Ct. at 823-824, 78 L.Ed.2d at 637.

Because the majority of California criminal cases never result in a public trial, public access to preliminary hearings is important for its community therapeutic value. Thus, all of the analytical underpinnings of the Court's decisions, including *Press-Enterprise,* apply with equal weight to this case.

III

THE DIAZ STANDARD PRACTICALLY GUARANTEES CLOSED PRELIMINARY HEARINGS.

Diaz failed to place any real evidentiary burden on a party seeking closure. Indeed, *Diaz* expressly contemplates a magistrate finding a reasonable likelihood of substantial prejudice on mere predictions. *Diaz,* 37 Cal.3d at 782, 691 P.2d 1026, 209 Cal.Rptr. 360. The case holds that the standard it establishes is "a lesser standard than a factual finding of actual prejudice." *Id. Diaz* does not require the magistrate to consider alternatives to closure, or to consider whether closure will in fact be effective in the particular case. The case does not even mention the rigorous requirement imposed by the Court, and by Circuit Court decisions, that the basis for a court's closure decision be articulated in findings. *See, e.g., Press-Enterprise,* 464 U.S. ____, 104 S.Ct. at 824-825, 78 L.Ed.2d at 639; *Application of the Herald Co.,* 734 F.2d 93, 100-101 (2d Cir. 1984); *Associated Press v. U.S. Dist. Ct. For C.D. of Cal.,* 705 F.2d 1143, 1146 (9th Cir. 1983); *United States v. Chagra,* 701 F.2d 354, 361-365 (5th Cir. 1983); *United States v. Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982); *United States v. Criden,* 675 F.2d 550, 560-561 (3d Cir. 1982).

As a practical matter, *Diaz* allows magistrates to close preliminary hearings on a mere conclusory statement that a reasonable likelihood of substantial prejudice exists. The public's ability to attend preliminary hearings is left to the unfettered discretion of a magistrate, whose decision to close a hearing is safe from appellate review so long as the magic words are said.[8] By refusing to recognize the public's First Amendment right to attend a critical stage of the criminal process, and by eviscerating the Legislature's attempt to insure open preliminary hearings, *Diaz* practically guarantees routine closures of preliminary hearings. Amici's only avenue of redress is for the Court to overturn *Diaz* and establish a First Amendment-based right of access to such hearings.[9]

IV

CONCLUSION

The right of the public to the free flow of information about the administration of its judicial system is crucial to democratic society:

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[8]The only avenue of appellate redress the public has is by petition for writ of mandate that must establish, among other things, abuse of discretion. Since *Diaz* imposes no effective standards by which that discretion is to be exercised, the burden is impossible. In any event, approximately 90% of all such petitioners are routinely denied. San Diego County Bar Association Appellate Court Committee, *California Appellate Practice Seminar Syllabus,* Appendix A, 16 (1985).

[9]The public in California has no real opportunity to establish a meaningful access right through the Legislature. The amendment to California Penal Code Section 868 providing that hearings can only be closed when "necessary" to protect a defendant's fair trial right was a legislative reaction to the *San Jose Mercury-News* decision. Since *Diaz* reads the word necessary out of Penal Code Section 868, further legislative amendments will provide no meaningful access right.

> "Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Nebraska Press Asso. v. Stuart*, 427 U.S. 539, 587, 96 S.Ct. 2791, 49 L.Ed.2d 683 (Brennan J., concurring).

After every preliminary hearing, a person is either bound over for trial or charges are dismissed and the accused returns to society. Important questions inevitably arise about the propriety of the court's decision. Such judicial decisions cannot be allowed to occur in secret. Unless the Court acts to establish a strict standard based on the First Amendment, the public in California will continue to be prohibited access to this critical stage of the criminal process.

DATED: April 26, 1985

Respectfully submitted,

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THE COPLEY PRESS, INC.

No. 84-1560

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California Corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

On Writ of Certiorari to the California Supreme Court

JOINT APPENDIX.

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PETITION FOR CERTIORARI
FILED MARCH 29, 1985
CERTIORARI GRANTED OCTOBER 15, 1985

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

INDEX TO JOINT APPENDIX

Superior Court

OF THE

State of California

County of Riverside

PEOPLE

VS.

ROBERT RUBANE DIAZ

Dept. 14

February 10, 1983

CR-19889

COUNSEL:

District Attorney by: P. MAGERS, Deputy

Public Defender by: J. LEE, Deputy, P. LAHTI, Deputy

S. Waters — Press Enterprise

Reporter: K. SMITH

Proceeding: 995P.C. Motion; 1538.5P.C. Motion; Motion for Correction of Transcript; Motion to Unseal Transcript; and Motion to Conduct Extended Media Coverage.

187 P.C. (Ct I thru XII); Spec. Circum. 190.2(a)(3)P.C.

People represented as indicated above and defendant (custody) present with counsel.

Defendant's motion for correction of transcript is resumed.

Court finds transcript as corrected is correct. Twenty-three partial list of corrections to transcript are deemed addendums to transcript, and ordered filed.

Discussion in closed Court with defendant and defendant's counsel. Court reporter, court clerk and bailiff are present.

In Open Court: Press Enterprise's motion to conduct extended media coverage, and People's motion to unseal transcripts is argued by counsel. Portion of transcript pages 11 and 12, marked as defendant's identification A, and subsequently admitted and defendant's exhibit A. Portion of transcript pages 4235 thru 4237 respectively, marked as defendant's identification B, and subsequently admitted and defendant's exhibit B. Portion of transcript pages 4224 thru 4226 respectively, marked ad defendant's identification C, and subsequently admitted and defendant's exhibit C. Notebook, marked as defendant's identification D, and subsequently admitted as defendant's exhibit D. Tape, marked as defendant's identification E, and subsequently withdrawn and returned to counsel.

Court orders preliminary hearing transcripts to remain sealed. Court further orders Defendant's motion to dismiss information and points and authorities, and People's points and authorities in opposition to motion to be sealed.

Defendant moves to exclude the public and seal the 995P.C. motion and 1538.5P.C. motion. Matter argued by counsel. Motion denied.

Court is adjourned until 02-18-83 at 8:30 A.M. in Dept. 14, for the 995P.C. motion and 1538.5P.C. motion.

BARNARD, Judge
E. JONES, Clerk

Court of Appeal
State of California

FOURTH APPELLATE DISTRICT

DIVISION TWO

PRESS-ENTERPRISE COMPANY,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE,
Respondent.

ROBERT RUBANE DIAZ,
Real Party in Interest.

4 CIVIL 29785
COUNTY NO. CR 19889

Filed: August 18, 1983

THE COURT:

To determine the pending writ proceeding it is necessary for the court to have the sealed transcript of the preliminary hearing in Action No. 19889, entitled *People v. Robert Rubane Diaz,* now pending in the Riverside Superior Court.

The clerk of the Riverside Superior Court is therefore ordered to transmit said transcript to this Court upon receipt of a certified copy of this order.

KAUFMAN, J.
Acting P.J.

In the Supreme Court

OF THE

State of California

PRESS-ENTERPRISE COMPANY,
Petitioner,

VS.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent;

ROBERT RUBANE DIAZ,
Real Party in Interest.

L.A. 31876

Filed: December 31, 1984

In the instant case we consider the appropriate standard to be applied by a magistrate in determining whether the public's right of access to preliminary hearings should be limited due to the risk of impairment of a defendant's right to a fair trial.

The real party in interest, Robert Rubane Diaz, was charged by a complaint filed in the municipal court with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. He was also charged with special circumstances. At the time of the preliminary hearing there were many representatives of television stations, radio stations and newspapers present. On Diaz' motion pursuant to Penal Code section 868,[1] the court ordered the preliminary hearing closed to the press and public. The preliminary hearing was held over a period of 41 days, and Diaz was held to answer on all charges. The judge sealed all transcripts.

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[1]Unless otherwise indicated, all statutory references are to the Penal Code.

About seven months later, petitioner sought to gain access to the transcripts in the superior court. The prosecution joined in the motion. Diaz opposed, presenting evidence of the widespread publicity given to the case by the media, some of which had continued until the time of the hearing. The judge, concerned that releasing the transcript might require either delay of the proceedings or transfer of the trial to another jurisdiction, pointed out that defendant had a right to trial without undue delay and a Sixth Amendment right to trial in the vicinage. The judge found that "there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial." He ordered that the transcript remain sealed, and petitioner commenced the instant mandamus proceeding.[2]

THE ASSERTED CONSTITUTIONAL RIGHT OF ACCESS

Prior to its 1982 amendment, section 868 provided that upon the request of the defendant, the magistrate shall exclude the public from the preliminary examination. In San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, the statute was upheld against a claim that the federal and state Constitutions give the press and public a right of access to preliminary hearings that may be foreclosed only when outweighed by defendant's interest in a fair trial and that section 868 violated that right because it had no provision for balancing of competing interests in individual cases.

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[2]The trial has been completed. Although technically moot, the case presents an important question affecting the public interest, and review is appropriate. (San Jose Mercury-News v. Municipal Court (1982) 30 Cal.3d 498, 501, fn. 2.)

In considering the claim of violation of federal constitutional rights, the court recognized that the United States Supreme Court has held that the First Amendment provided a qualified right of public access to the trial and that a majority of justices had recognized a qualified right of access to pretrial hearings such as suppression hearings. (30 Cal.3d at pp. 503-506.) The court pointed out that the basis of the qualified access right was the long history of trials being presumptively open and that the open trial tradition guards against persecution and favoritism, increases public awareness of the judicial process, inspires confidence in the criminal justice system, and serves the cathartic needs of the community. (30 Cal.3d at p. 505.)

In *San Jose Mercury-News,* the court also pointed out that seven of the United States Supreme Court justices had stated that preliminary hearings, unlike trials, were traditionally private at common law and were distinguishable from pretrial suppression hearings. (30 Cal.3d at pp. 504-506.) This court concluded that no right of access arose upon the First Amendment. (30 Cal.3d at p. 506.)

In rejecting the claim of conflict with the California Constitution, the court recognized that state constitutional guarantees may give greater protection to some rights than the federal counterparts, but concluded that the Legislature reasonably gives fair trial rights a preference over access rights in certain classes of proceedings where danger of prejudice is strong and proof on a case-by-case basis appears difficult and that section 868 was a permitted means of protecting defendants' rights to a fair trial free of juror bias.[3] (30 Cal.3d at pp. 506-514.)

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[3]Because they bear on the proper interpretation of section 868 as amended in 1982, the policy concerns which led to the court's conclusion will be discussed in detail in the statutory portion of the opinion.

Petitioner urges that recent decisions of the United States Supreme Court require repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to a preliminary hearing. Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, involved a Massachusetts statute requiring mandatory closure of trial during the testimony of a minor sex victim. The court again relied upon the tradition of trials being open to the press and public, and it asserted that before a state may deny the right of access it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. (457 U.S. at pp. 603-607.) Responding to an argument that trials have not always been open during testimony of minor sex victims, the court in a footnote stated that whether the First Amendment right of access can be restricted in the context of any criminal trial depends not on the historical openness of that type of trial but rather on the state interests assertedly supporting the restriction. (457 U.S. at p. 605, fn. 13.) The court concluded that the Massachusetts statute was not narrowly tailored to accommodate the state's compelling interest in protecting the physical and psychological well-being of a minor and that rather than mandatory closure the state's interest may be protected by a case-by-case determination whether closure is necessary to protect the welfare of the minor. (457 U.S. at p. 608.)

The second case relied upon by petitioner is Press Enterprise Company v. Superior Court (1984) ____ U.S. ____ [78 L.Ed.2d 629, 104 S.Ct. 819], where the court held that an order closing voir dire proceedings was invalid on the ground that the trial judge had failed to consider alternative measures. In a concurring opinion, Justice Stevens stated that the purpose of the access right is assuring freedom of communication on matters

relating to the functioning of government and that "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." (____ U.S. at p. ____ [78 L.Ed.2d at p. 742, 104 S.Ct. at p. 828].)

Neither case warrants repudiation of the conclusion in *San Jose Mercury-News* that the First Amendment does not provide a right of access to preliminary hearings. Both cases were concerned with the right of access to trials rather than preliminary hearings. The problem of potential prejudice to the defendant is substantially different in relation to public trials than it is in relation to public preliminary hearings. In *Press Enterprise Company* the court emphasized that prejudice to the defendant remains the primary concern, stating: "No right ranks higher than the right of the accused to a fair trial." (____ U.S. at p. ____ [78 L.Ed.2d at p. 637, 104 S.Ct. at p. 823].) The main concern asserted in both cases to justify closure was not prejudice to the defendant but the interests of others, i.e., the privacy rights of prospective jurors and the physical and psychological well-being of minor sex victims.

While a footnote in *Globe Newspaper Co.* suggests that historical openness may no longer be an element of the First Amendment access right, the footnote by its own language is limited to trials. (Globe Newspaper Co. v. Superior Court, *supra,* 457 U.S. at p. 605, fn. 13.) The subsequent *Press Enterprise Company* decision not only indicates that one of the bases of the access right to trials as established by Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555 is that trials were open at the time of the adoption of the First Amendment but also devotes the first portion of the opinion to establish that at the time of the adoption of the First Amendment public jury selection was the common practice in America. While the

statement of Justice Stevens relied upon by petitioner is to the effect that the access right is not limited to trials, it does not establish that historical conditions are irrelevant because he also states that the question before the court " 'focuses . . . on First Amendment values and the historical backdrop against which the First Amendment was enacted.' " (____ U.S. at p. ____ [78 L.Ed.2d at p. 642, 104 S.Ct. at p. 828].)

We conclude that petitioner and amici have failed to establish a basis for repudiating the conclusion in the 1982 decision in *San Jose Mercury-News* that the First Amendment access right does not extend to preliminary hearings. In addition, petitioner and amici have not pointed to any matters warranting repudiation of the portion of *San Jose Mercury-News* relating to the California Constitution.

THE STATUTORY ACCESS RIGHT

Shortly after the decision in 1982 in *San Jose Mercury-News,* the Legislature amended section 868 to delete the defendant's absolute right to closure and to establish a right of access to preliminary hearings. The amended section reads: "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is *necessary* in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination [all but certain enumerated officials, defendant and his counsel, and the prosecuting witness and a friend.]" (Italics added.)

The parties and amici dispute the appropriate standard to be applied by the magistrate in determining whether exclusion is "necessary" in order to protect the defendant's right to a fair and impartial trial. Some of the language in the brief submitted by amici suggests that

exclusion is appropriate only if the magistrate finds that failure to exclude will result in an unfair trial.

Petitioner argues for the test set forth in United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167 where the court stated that an "accused who seeks closure must establish 'that it is strictly and inescapably necessary in order to protect the fair trial guarantee.' This burden may be discharged by demonstrating: (1) 'a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public'; (2) 'a substantial probability that alternatives to closure will not protect adequately his right to a fair trial'; and (3) 'a substantial probability that closure will be effective in protecting against the perceived harm.'" *Brooklier* did not involve preliminary hearings but rather hearings on motions to suppress and the juror voir dire. The *Brooklier* test is based on the dissenting opinion of Justice Blackmun in Gannett Co. v. DePasquale (1979) 443 U.S. 368, 406, 440-446. Justice Blackmun, joined by Justices Brennan, White and Marshall, urged that the Sixth Amendment right to a public trial was not personal to the defendant but established an access right for the public. The majority rejected that view.[4]

[4]Justice Blackmun recognized that in some cases of suppression hearings closure might be justified. "The trial judge faced with a closure motion has the more difficult task of looking into the future. I do not mean to suggest that only in the egregious circumstances of cases such as *Estes* and *Sheppard* would closure be permissible. But to some extent the harm that the defendant fears from publicity is also speculative."

"If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require. Thus, it might well be possible to exclude

Defendant urges that the proper test is that the preliminary hearing must be closed upon a defendant's request if the magistrate finds "a reasonable likelihood" of substantial prejudice which would impinge upon the right to a fair trial. The trial court purported to apply this test. The test appears to be based on the concurring opinion of Justice Powell in Gannett Co. v. DePasquale, *supra*, 443 U.S. 368, 397-403. He joined the majority opinion in holding that the Sixth Amendment did not confer access rights but concluded that the First Amendment provides a limited right of access to suppression hearings. He rejected Justice Blackmun's test for closure on the ground that it was inflexible and could prejudice defendant's rights and disserve society's interest in the fair and prompt disposition of criminal trials. He concluded that the test is whether "a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury." (443 U.S. at p. 400.) He stated that it is the defendant's responsibility to show that public access would interfere with the fairness of his trial but that those opposing closure have the burden of showing that alternative procedures are available that would eliminate the danger of prejudice.[5]

the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to supress would not be revealed. *United States* v. *Cianfrani*, 573 F.2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed." (443 U.S. at pp. 444-445.)

[5]In *Gannett Co.* the trial judge found "a reasonable probability" of prejudice, and the majority held this would overcome a First Amendment right of access.

The test of reasonable likelihood that the defendant will not receive a fair and impartial trial is used in considering motions for change of venue. (Odle v. Superior Court (1982) 32 Cal.3d 932, 937; Martinez v. Superior Court (1981) 29 Cal.3d 574, 578.) Also the test has been used with respect to gag orders. (Younger v. Smith (1973) 30 Cal.App.3d 138, 159-164; see Brian W. v. Superior Court (1978) 20 Cal.3d 618, 624, fn. 7.) The Legislature has established a standard of reasonable likelihood of prejudice to the defendant to be applied in determining whether a grand jury transcript should be unsealed. (§ 938.1, subd. (b).) The test has also been applied in determining whether a purported confession should be suppressed pending trial. (Cromer v. Superior Court (1980) 109 Cal.App.3d 728, 731 et seq.)

The legislative history of the amendment to section 868 shows that the Legislature intended the courts to determine the appropriate standard. Assembly Bill No. 277 as originally introduced and as adopted opens preliminary hearings unless the magistrate finds it "necessary" to close to protect the defendant's right to a fair trial. As originally worded, the bill provided that the finding that it is necessary to close "would require a demonstration of a clear and present danger of irreparable damage to the defendant's right to a fair and impartial trial, that the alternatives to closure will not adequately protect that right, and that the closure will effectively protect against the perceived harm." In the Assembly, the second condition relating to alternatives to closure was deleted before the bill was passed.

Clear and present danger language was contained, although in slightly different form, in the bill passed by the Senate, but the Conference Committee report was rejected in the Assembly, and the bill was amended in the Assembly to substitute "preponderant probability" for

"clear and present danger." The bill was amended in a second Conference Committee report to delete all of the language defining "necessary," and as finally approved, the amendment to section 868 provides no definition of "necessary." (The bill as enacted also dealt with matters other than the amendment of section 868.)

The deletion of any definition of the word "necessary" shows that, while the Legislature concluded that preliminary hearings should be public unless there was conflict with the defendant's right to a fair trial, the Legislature intended that the courts should determine the standard to be applied in weighing the public's right of access against the defendant's fair trial right.

In *San Jose Mercury-News*, the court detailed the policy factors in favor of holding preliminary hearings in public: Exposure of governmental functions to public view serves societal interests in a democratic government. Open preliminary hearings guard against persecution and favoritism, increase public awareness of the judicial process, inspire confidence in the criminal justice system, and serve the cathartic needs of the community. Preliminary hearings are an important step in the accusatorial process. There are many similarities to the trial; witnesses may be cross-examined, each side has an incentive to prevail, and the hearing may reveal weaknesses in the prosecution or defense, forecasting the ultimate disposition.

Often the preliminary hearing turns out to be the only judicial proceeding of substantial importance that takes place during a criminal prosecution because so many cases are disposed of without trial. The hearing often provides the forum for issues involving police misconduct and exclusion of evidence. The court also pointed out that pretrial publicity, even pervasive adverse publicity, does

not invariably lead to an unfair trial. (30 Cal.3d at pp. 505, 509-514.)

On the other hand, the court in *San Jose Mercury-News* pointed to several concerns militating against a public preliminary hearing and against requiring defendant to establish that prejudice will occur from a public hearing. While the Legislature has since amended section 868 to delete the defendant's absolute right to closure, the concerns enumerated in *San Jose Mercury-News* obviously bear upon our determination of the appropriate standard to be applied under the amended statute.

The concerns militating in favor of a right of closure recognized by the court include: The evidence at the preliminary hearing may be one-sided and misleading because the testimony is often that of the prosecution only — the defense remaining silent if it appears that reasonable or probable cause has been established. Many nonlawyers may not be aware of the function of a preliminary hearing which is not a trial with the danger that they may ascribe to a one-sided hearing the legitimacy and credibility of a trial. Magistrates may err in their evidentiary hearings, and there is a danger that highly prejudicial evidence which will be inadmissible at trial will be admitted or adverted to and reported by the media.

In addition factual, relevant reporting, no less than inflammatory publicity, may threaten a defendant's right to a fair trial by producing a jury pool "within which a defendant's guilt has already been ascribed." (30 Cal.3d at p. 512.)

Because the preliminary hearing takes place at an early stage in the criminal prosecution, it may be difficult or impossible for the defendant to make a showing of the prejudice which will occur from publicity. At an early stage, the community reaction and the media attitude may

not be clear, and the defendant may have little knowledge of the prosecution's strategy and evidence. "Finally, certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication, can involve equal and even greater intrusions on speech and press rights. (See, e.g., Nebraska Press Assn., *supra,* 427 U.S. 539, 556-560 [49 L.Ed.2d 683, 695-698]; Brian W., *supra,* 20 Cal.3d 618, 624, fn. 7.) Changes of venue or continuances may subject the parties and courts to considerable inconvenience or expense and may even violate the defendant's right to speedy trial in the vicinage. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; Brian W., *supra,* 20 Cal.3d at p. 625.)" (San Jose Mercury-News v. Municipal Court, *supra,* 30 Cal.3d at pp. 511-513.)

We reject the view that a magistrate in ruling on a request to close the preliminary examination must find that in fact an open preliminary hearing will result in a denial of fair trial. At the time that the magistrate makes the finding predictions must be made as to the amount and nature of publicity which will result from an open preliminary hearing and as to the impact of the anticipated publicity. The legislative history of the two standards contemplated, "clear and present danger" and "preponderant probability," indicates that the Legislature had in mind a lesser standard than a factual finding of actual preju- dice.

The legislative history of the two standards contemplated, as well as its use of the word "necessary," makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. "Necessary" is often used in the sense of essential (Webster's New Internat. Dict. (2d ed. 1959) p. 1635), and the terms "clear and present danger" and "preponderant possibility" reflect that a substantial

showing of potential prejudice must be made before the preliminary hearing may be closed.

The test urged by defendant, a reasonable likelihood of substantial prejudice, and the test urged by petitioner, a substantial probability of irreparable damage, meet the requirement of a substantial showing of potential prejudice. While there is some difference between the two standards, it obviously is not very great.

Weighing the language of section 868, the legislative history, and the policy factors discussed above, we conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal Code section 868 makes clear that the primary right is the right to a fair trial and that the public's right of access must give way when there is conflict.

Once a defendant establishes a reasonable likelihood of substantial prejudice, there is a clear and present danger of prejudice, and the prosecution or media may overcome the defendant's showing by a preponderance of the evidence to the effect that there is no reasonable likelihood of prejudice. But if the showing in opposition fails to overcome the defendant's showing that there is a reasonable likelihood of substantial prejudice, it would be improper for the magistrate to jeopardize the fair trial right by permitting a public preliminary hearing. The primacy of the right to fair trial, viewed in the light of the policy consideration in favor of closure set forth above, requires us to conclude that a defendant who has established a reasonable likelihood of substantial prejudice after all of the evidence is considered may not be compelled to risk his fair trial right by an open hearing.

The peremptory writ of mandate is denied. The alternative writ, having served its purpose, is discharged.

BROUSSARD, J.

WE CONCUR:
BIRD, C.J.
MOSK, J.
KAUS, J.
REYNOSO, J.

PRESS-ENTERPRISE COMPANY
v.
SUPERIOR COURT
L.A. 31876

CONCURRING OPINION BY GRODIN, J.

The majority's determination that the First Amendment provides no right of access to preliminary hearings is unnecessary to the decision of this case, and I do not join in it. The only constitutional question presented is whether the First Amendment requires a *greater* right of access than the Legislature has seen fit to establish by statute. I agree with the majority that by its amendment to section 868 the Legislature has decided that open preliminary hearings should be the "rule rather than the exception" (typed op., 16), the exception existing only when exclusion of the public is, to use the language of the statute, "necessary in order to protect the defendant's right to fair and impartial trial."

I agree also that the determination of "necessity" must inevitably be a matter of judgment based upon probabilities, and that the phrase "substantial showing of potential prejudice" (or, what amounts to the same thing, a "reasonable likelihood of substantial prejudice") constitutes a fair description of the requisite assessment. I do not believe that the First Amendment would require more than that.

GRODIN, J.

PRESS-ENTERPRISE COMPANY
v.
SUPERIOR COURT
L.A. 31876

CONCURRING AND DISSENTING OPINION BY LUCAS, J.

I concur in the judgment but dissent to the majority's analysis. By reason of the 1982 amendment to Penal Code section 868, preliminary hearings are required to be "open and public" unless the magistrate expressly finds that exclusion of the public is "necessary" to protect the defendant's right to a fair and impartial trial. In the present case, on denying petitioner's motion to inspect the preliminary hearing transcripts, the trial court found merely that there was a "reasonable likelihood" of prejudice to the defendant, a standard which the majority now embraces. Yet a showing of "reasonable likelihood" of prejudice is not equivalent to a showing of *necessity*. In my view, the majority's new standard improperly ignores the statutory language.

As the majority concedes, "The legislative history . . . as well as its use of the word 'necessary,' makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than the exception. 'Necessary' is often used in the sense of essential . . . ." (*Ante*, p. ____ [maj. opn. at p. 16].) Although a showing of *actual* prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a *substantial probability* of prejudice. (See United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, 1167.) No such showing was made here.

As the trial is completed and the case is now moot, I concur in the judgment denying the peremptory writ.

LUCAS, J.

PRESS-ENTERPRISES CO.
v.
SUPERIOR COURT RIVERSIDE
L.A. No. 31876

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Trial Court & No.:	Riverside County Crim. 19889
Superior Court Judge:	The Honorable JOHN H. BARNARD

EXCERPT FROM
PRELIMINARY HEARING

REPORTER'S DAILY TRANSCRIPT

BEFORE HONORABLE HOWARD DABNEY,
JUDGE

DIVISION 20

Tuesday, July 6, 1982

APPEARANCES OF COUNSEL:

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For the Defendant:	MALCOLM S. MACMILLAN *Public Defender* By: CLARENCE HEWATT JOHN LEE *Deputy Public Defenders* 3536 Tenth Street Riverside, California 9250
Reported by:	ETHEL I. BROOKS, CSR No. 5639 EVA I. YAKUTIS, CSR No. 5084

THE COURT: Ladies and gentlemen, we are back on the record. All the parties and the Defendant are present.

Mr. Hewatt, first of all — Mr. Magers, I'd like simply to state for the record that some time ago there was an agreement orally among the parties in the court that there would be a daily transcript and the Court is at this time

ordering that transcript. I don't believe there is anything on the record.

I'd like to take any other motions as far as publicity are concerned now.

MR. HEWATT: At this time, after conferring with my client, I would like to exclude all press and prospective witnesses under 868 from the courtroom.

I feel in the best interest of my client and possibly because of the fact that this case eventually will be tried in the County of Riverside, that the press be excluded from the proceedings in this matter.

THE COURT: Mr. Magers, do you have anything to say?

MR. MAGERS: I'll submit it to the Court.

THE COURT: All right, ladies and gentlemen, not only is there a statute in the Penal Code that states it's the Court's obligation under this circumstance but there is also a case of the United States Supreme Court called Ganat Company versus DePasqual, citation is 1979, 443 U.S. 368, which indicates that it is a trial court's affirmative constitutional duty to protect the Defendant's due process rights which include the right to a fair trial. And so beyond the statute this Court has an obligation and based on that United States Supreme Court case and the statue, I feel that in this particular case and past appearances in the Court, there has been national publicity. As a result of Court appearances, that each Court appearance of the Defendant, media has been present and has been reported in the media and I feel that because of the Preliminary Hearing in which many times the defenses are not presented to show the Defendant's side of the issue, that only one side may get reported in the media.

Therefore, I find that the motion should be granted to protect the Defendant's right to a fair trial, and impartial trial.

Therefore, the media cannot be present nor can the public. They are — you are excluded, ladies and gentlemen. There are certain exceptions to that, of course, and that's necessary court personnel that are required.

But, ladies and gentlemen, I am sorry; however, you will have to remove yourselves from the courtroom and during the pendency of this proceedings.

So, we will recess until everyone is absent.

(Recess taken.)

THE COURT: Back on the record. All the parties are present and counsel.

I'd like to make sure the record reflects that additional personnel are in the courtroom. And I understand that there has been a request by defense to have Mrs. Diaz present, Mr. Diaz's wife, in the courtroom.

EXCERPT FROM

PRELIMINARY HEARING

Before the Honorable HOWARD DABNEY

DIVISION 20
August 31, 1982

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Official Court Reporters

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contained lidocaine in the amount of a 23 per cent solution and when the bolus was found, it contained approximately 1100 milligrams of lidocaine and it was marked 100 milligrams.

The technologist from Abbott Laboratories in Chicago testified in this court that the corresponding lot number pulled and tested in Chicago contained a 2 per cent solution; and their opinion was: When the bolus — that was found in the bedcovers — was shipped from the factory in Chicago, it contained a 2 per cent, 100-milligram solution of lidocaine as labeled.

When you consider all the evidence in this case, Your Honor, we have an inescapable conclusion that the People, of course, has met their burden in this case. Furthermore, I feel due to the length, quality and sufficiency of the evidence we introduced here, we have proved, we have met the burden beyond a reasonable doubt.

Thank you.

THE COURT: Thank you, gentlemen, for the arguments.

I want to speak to Mr. Hewatt's statement about an experiment on lidocaine and that this may be an experimental approach.

Mr. Hewatt, I have to say, sir, that I don't believe that the evidence in this case, Dr. Jutzy testified that this was not an experimental type of opinion that he was giving. In fact, he said that it's well known clinically what happens.

It's well documented. It's not experimental, but based upon pathological material.

So, I think that Dr. Jutzy has clearly said that this is not some new experimental device of medicine. This is something well known and accepted.

It's also well known, I believe, that he brought out that you can't experiment with live human beings as to what is a lethal dose. Obviously, that goes to — is contrary to the profession.

I want to take each of these patients and the accounts. But I also want to correct the record in several instances that these nurses saw bottles on Mr. Diaz, and that was at two different hospitals. I believe that's Annette Miller, Race, and Cheville.

Also, as far as Miss Bayless being dead, Dr. Jutzy clearly stated that Miss Bayless was not dead at the time that she received this lidocaine overdose. That she was clearly not dead at the time you've indicated, Mr. Hewatt, and I believe that's clear. In fact, I would like to say that I think on Miss Bayless, the evidence is probably as strong as any of the accounts here as to Mr. Diaz.

So Mr. Diaz understands — and I won't prolong the agony, Mr Diaz — it's my intention, sir, to hold you to answer to all of the accounts in the Complaint. In fact, at one time I considered adding an account which was Ethel Shaw for at least attempted murder on Ethel Shaw because the M.O. is so clear; but I am not going to do that.

First of all, I think you have to all understand that the cause of death was testified to by Dr. Modglin and Dr. Root. Only in one patient, that's Mr. Kean, did the indication come from Dr. Modglin that the heart was and the heart disease was a basic cause of death; but nevertheless, he indicated that lidocaine was a significant contribution to his death and it did shorten his life and that's

all I believe it takes to be a criminal agency that somehow life is shortened.

But in any event on each of those counts, gentlemen, I think that the evidence is very strong. Other than Kean, which I have indicated, would I believe that Dr. Modglin stated was the cause of death, that lidocaine did shorten the life.

I don't think that the Cline count is as strong as some of the others, and I don't think that the Marian Stewart count is as strong as the others; but I do believe that those individuals — Kean, Cline and Stewart — the burden has been met as far as this Court is concerned as far as those three counts are concerned.

I'll just simply say for the record that I have not been in this system as long as a lot of people, but maybe longer than a majority of the people. When we talk about violence, it seems to me this is the most dangerous type of criminal. At least, a person who has a knife and a gun, you know who you have to protect yourself against, but these people all came into this hospital expecting that their lives would be lengthened by this experience; and I think Mr. Diaz is an extremely dangerous man. Whether that's an appropriate comment by me or not, I don't know; but I can't let it pass. I think somebody who is in this kind of medical health and an individual works in an intensive care unit and starts with this type of approach to treating patients, I think that this is the most dangerous type of individual there is.

First of all, because this is a very difficult death to diagnose; and obviously, has been until it became so prevalent at this Perris Hospital, that finally somebody recognized that there was something odd going on here and started to delve in here.

I can't believe that this would not still be going on if this had happened here and there scattered at different times. I don't think anybody would have ever gotten the picture.

MR. LEE: Your Honor, if at the risk of being, perhaps, rude to the Court, may I remind that the Court that the affirmative defense, there has been no affirmative defense here. And certainly what the Court has heard during the course of the past eight weeks is largely the Prosecution's case and the cross-examination of the Prosecution's case by the defense, I do feel that it is inappropriate on the Court's part to characterize Mr. Diaz at this point insofar as his side of the story as we all know has yet to be heard. And with that, I —

THE COURT: You are not being rude, Mr. Lee. I would expect you to tell me that, sir, and I have to agree that only one side of the story is here. I am just simply indicating that the one side that I have seen in my experience, I think, that you have got a very difficult row to hoe, whatever your defense.

The only thing that's disturbing me about this is the issue that you can always tell what the motive is. It's money. It's anger, something of that nature, some personal gain. And out of this whole case, the thing that just totally loses me is I cannot understand what the motive could possibly be. I hadn't figured that out yet.

In any event, I want to get the Complaint here.

MR. LEE: Your Honor, it is my understanding that the — well, it is my understanding that Mr. Diaz is entitled to know that the Court is sufficiently satisfied that there is some competent evidence of each element of the charged offenses.

For purposes of the record, if the Court could indicate for us what it determines to be sufficient evidence for the

elements of the charged offenses, that being the — excuse me, the unlawful killing of a human being with malice aforethought being the elements of 187, that's murder, of the Penal Code.

And also the use of the 1101 (b) evidence as the People have indicated was their theory, it's my understanding that there is a particular burden of proof that the uncharged offenses or the similar offenses must be sufficiently satisfied, and we would also request the Court to indicate for us whether, what burden or what degree of evidence it is determining in using the 1101 (b) evidence.

THE COURT: All right, sir.

Let's take up the 1101 (b) evidence first. And that is Dr. Root's testimony, and I accepted that. And I will accept his testimony beyond a reasonable doubt, not just to the burden of this Court but beyond a reasonable doubt.

As far as the testimony by the nurse, Rita Driver, I believe her statements beyond a reasonable doubt.

As far as the elements are concerned of malice, Mr. Diaz is a certified cardiac care nurse, coronary care nurse with all kinds of experience. He has worked in ICU units, I don't know how many different ones. He is an experienced nurse. No one could give this kind of lidocaine therapy to anyone without knowing exactly what he was doing.

I find beyond a reasonable doubt that all of these individuals died of lidocaine poisoning.

I find beyond a reasonable doubt that each of the cardiologists determining that each of these individuals' deaths were consistent with overdoses of one to two thousand milligrams of lidocaine, I find that beyond a reasonable doubt.

I find Dr. Peat's testimony, the toxicologist, concerning the effects of lidocaine in the body, I see nothing to impeach him. I accept what he said beyond a reasonable doubt.

Let's go through each of these patients.

Count I, Irene Graham. Dorothetta Ernest testified she didn't give anybody any lidocaine. She actually saw Diaz injecting something into his arm at the bedside near or at the time when it was possible that the lidocaine was administered.

Donna MacDonald testified she didn't give anything to Graham in the way of lidocaine.

Sandra Phenicie didn't give anything to Graham, and she was the first to arrive off the med-surg floor responding to the code.

I think that there is a strong suspicion beyond what's required in this particular proceeding to believe that Mr. Diaz injected a lethal dose of lidocaine into Ms. Graham.

On Bernard Kean, although the question of the heart disease, whether a significant contribution, nevertheless, lidocaine shortened the life of this individual. And with the experts testifying that there was a lethal dose administered, Lois Cheville, her testimony was that she was with Mr. Diaz. I believe her statements concerning what happened on the morning hours of the 4th of April are correct.

She had a difficult time with her memory without her charts, but in observing her testify and the manner in which she testified and in particular the manner in which she was cross-examined, I thought she controlled herself exceedingly well with some of the questions that were asked. And I found her to be very believable.

As Beatrice Cline, Donna MacDonald testified that she saw Diaz in and out of the room just before Ms. Cline seized.

And the time, as I understood it, coincided with what the experts testified concerning the administration of lidocaine. And, again, for the purposes of this proceeding and reasonable suspicion, I think it's beyond that point. It's almost beyond a reasonable doubt.

I think that Minnie Lee Dempsey, no question about the expert's testimony of how this lady died. Phenicie testified she didn't administer any lidocaine to Dempsey; no one came into the room an hour before she coded.

Carl Chetlan came in later, didn't know where Mr. Diaz was about two minutes before she seized. Mr. Chetlan also, as a witness, I have to comment on. His memory seemed to be very good on some areas. He left something to be desired as a witness particularly when he decided he was going to change the medical report to protect a friend.

Nevertheless, on cross-examination, I didn't see anything which changed the fact that Mr. Diaz could have been at the bedside of Miss Dempsey just a couple of minutes before she died.

Lynn Race said that Diaz told her that Dempsey was going to code. And he had bottles in his pockets. I don't think there is any question for this proceeding that Mr. Diaz is guilty of that death and should be held to answer for the death of this individual.

Gertrude Bryant, again, the experts, I think, are unimpeachable as to what their opinions were, that she died of a lethal dose of lidocaine. Lidocaine shortened her life.

Again, Lois Cheville testified at length about this particular patient and that Mr. Diaz had given lidocaine to this patient.

Sandra Wingo also testified she didn't give any lidocaine to Bryant. She did some of the rhythm strips; but, basically, she didn't administer any lidocaine to Ms. Bryant. She had a patient named Hammond, which I heard from the testimony didn't fare too well.

Also, Carl Chetlan testified that he did rhythm strips; and Lynn Race, again, testified that Mr. Diaz told her that Bryant was going to code and he was nervous and pacing back and forth.

The evidence is sufficient, again, as far as the burden is concerned here in this preliminary hearing to hold Mr. Diaz for the death of Ms. Bryant.

As far as Count VI is concerned, Mr. Rainwater, a ninety-five-year-old man, lidocaine again shortened his life. Anybody who thinks because you are ninety-five, maybe you are not entitled to any more life; I don't believe that, and I don't think any rational person believes.

Again, the same clinical picture by the experts; Lois Cheville, again, was the nurse who worked with Mr. Diaz, didn't administer any lidocaine to the patient.

Sarla Duller was a registered nurse. She left the room of Mr. Rainwater; Diaz was at the bedside. She was watching the monitors when Rainwater seized. She was only gone a few minutes from the room.

Again, I think that the evidence is ample with all of the evidence other than just Duller.

Silvera, same thing. Gentlemen, if you want me to go through it, I will. I feel that the experts testified that

lidocaine in lethal doses were administered to this individual and that the lidocaine shortened the life.

Lois Cheville was the nurse; didn't give any lidocaine; Diaz was frequently in the room with Mr. Silvera.

Carl Chetlan charted on Silvera all the events of the last code. Silvera seized after Darling infused on the last code; but evidently Mr. Diaz hung the bottle.

Lynn Race said that he told her that Silvera was going to code. And, again, he was nervous and so forth.

Marian Stewart, Count VIII, same expert opinions. Lois Cheville, again, was the nurse on duty and Mr. Diaz and Chetlan; she came in. The vital signs on Ms. Stewart were all right and evidently there was no medications given until the lidocaine was given just before the code; and then 75-milliliter bolus was given just before the code was called. She didn't give any lidocaine during the code. Carl Chetlan gave no lidocaine in the code and the experts testified that this individual received a lethal dose of lidocaine. That leaves Mr. Diaz at the bedside.

Now, as far as Virginia Bayless goes, it's the same story, gentlemen.

Donna MacDonald was the L.V.N.

And I indicate to you now that I was told on argument that Diaz wasn't in the emergency room. He was in the emergency room, according to the testimony. Stroman helped Diaz bring Bayless in from the emergency room between 12:00 and 1:00 o'clock in the morning and flat-lined while she was working on Castro.

Phenicie also testified that no one went into the ICU unit for an hour before the code on Bayless occurred.

And Susan Stroman indicated that Bayless was her patient; Diaz asked her to look at something else — I

can't read my own writing — and she walked out of Bayless' room and Diaz was coming from Castro's room and he looked strange — I don't know what that means — but there was all kinds of problems during this period of time.

Problem that I see here was after Bayless was pronounced, Stroman took the slip of paper with the medications that were used during the code and asked Mr. Diaz what name she should put on the code sheet and he said, "Mar Val."

And she wrote it down on the code sheet. Based on what Ms. McCormick testified to the other day, obviously that was a violation of the hospital rules. I have never learned who Mar Val was, but, again, it's an attempt to falsify a document.

And there's testimony that Mr. Diaz is the one that asked someone to falsify it. It's got to be some consciousness of guilt.

Also, Mr. Diaz in a conversation with Ms. Stroman indicated that there would be a code at 4/15 at 7:10 a.m. that morning. And I don't have to tell you what happened.

Mr. Castro is the same situation. Donna MacDonald. The evidence in my opinion of Mr. Castro is quite strong. We have the thumbprint, and we have the bottle of lidocaine that came back 23 per cent lidocaine that Mr. Diaz asked MacDonald to inject. There is no question that that's the same vial or at least that's beyond a reasonable doubt she has her thumbprint on it. Very strong count, in my opinion.

Bertha Boyce, the doctor was present finally at the last code. Again, what did Mr. Diaz do when he was asked by the doctor to respond on the telephone to him? He never called her back and never told the patient, never told the

doctor what was happening to the patient and was in direct conflict with her order.

Mr. Swanson, Diaz was at Swanson's bedside and walked back with a 3 cc. syringe in his pocket. Toni Todaro also testified that to this count, and, again, it's extremely strong, particularly with the blood that was taken at 3:05 and the blood taken at 5:45 that Mr. Diaz' guilt is more than satisfactorily shown in that count.

And I am going to have to say that I am very close to holding Mr. Diaz to answer to the attempted murder of Ethel Shaw.

But I find that in each of these counts, that the testimony that I have gone over is only a portion of what I have heard, this being its ninth week. And I have not attempted to indicate for the record all of the evidence on any particular count. I simply find that I think the evidence is clear that Mr. Diaz should be held to answer on all of the counts in the Complaint.

Therefore, it appearing to me that the offenses in Count I through XII in the Complaint have been committed and there is sufficient cause to believe that the within named defendant, Robert Ruben Diaz, is guilty thereof, I order that you be held to answer to these charges, Mr. Diaz, and I set your first date in Superior Court on the 15th of September, 8:30 in the morning, Department VII, Judge Lopez. There is still no bail in this case.

Now, I have had one request sometime just before 4:00 o'clock by Mr. Bowman of the Press. He wanted to be heard by the Court if there was a holding order, and I told him I didn't know whether there was going to be one or not. And I don't know whether he's still around.

THE BAILIFF: He is, Your Honor.

THE COURT: Ask him to come in.

MR. HEWATT: Your Honor, I would like to cite Cromer vs Superior Court, 109 Cal. App. 3d, Page 733.

THE COURT: Okay.

MR. HEWATT: 734. And Rosato vs. Superior Court, 51 Cal. App. 3d 190, and ask that —

THE COURT: For what purpose?

MR. HEWATT: The sealing of the preliminary hearing transcript. Those, both those cases stand for, likely, stand for the possibility of if the transcript were released to the public that it would endanger the right of the defendant to have a fair trial. And if there is any reasonable likelihood of any prejudice, that those transcripts should, in fact, be sealed.

THE COURT: Okay. Mr. Bowman, did you want to make some kind of a statement for the record, sir, as far as the Press-Enterprise is concerned?

MR. BOWMAN: Chris Bowman for the Press-Enterprise, Riverside.

The Press-Enterprise would like to request that the transcripts of the preliminary hearing of Robert Diaz be released to the public — I presume you have made a ruling — after the ruling.

THE COURT: No, I have not made a ruling yet. You mean on the holding order?

MR. BOWMAN: On the holding order.

THE COURT: Yes, sir, I have made an order on that. And that's why it's necessary to have you put your statement on the record because the transcript will go across the street. Is there anything else you wanted to say, Mr. Bowman?

MR. BOWMAN: That the matter is of legitimate public interest, and the public and the press has been excluded for the past eight weeks. And that's all.

THE COURT: All right. Thank you.

Mr. Magers, do you want to add anything to the record?

MR. MAGERS: No. I am not familiar with those cases cited by Mr. Hewatt, Your Honor. I will submit it to the Court.

THE COURT: All right. I have to go back to the Deganti case again. I don't remember the exact cite, United States Supreme Court, but it is beyond the statutes of the State of California.

That case holds that a judge or magistrate, be it a trial or be it a preliminary hearing, has an affirmative constitutional duty to insure that a defendant has a fair trial. And even though it may overreach some state statute here, I feel that under that Deganti case which states exactly what my duty is, I have to believe that the only way to protect that right would be to seal the transcript. And I would so order it, based on the citations that Mr. Hewatt has given me and also on the Deganti case.

We have some matters of evidence. I believe that there were some defense exhibits. Would you show those to counsel and ask whether or not they wanted them returned?

MR. LEE: Your Honor, those that have been withdrawn by the defense, we would request they be returned.

THE COURT: All right. They are returned.

SUPERIOR COURT

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS OF FEBRUARY 10, 1983

Appearances:

FOR THE PLAINTIFF: GROVER TRASK, *District Attorney*
By: PATRICK MAGERS, ESQ.
4080 Lemon Street, second floor
Riverside, California 92501

FOR THE DEFENDANT: MICHAEL LEWIS, *Public Defender*
By: JOHN LEE, ESQ. and PATSI LAHTI
3536 Tenth Street
Riverside, California 92501

ALSO APPEARING: THOMPSON & COLEGATE, *Attorneys at Law*
By: SHARON WATERS
3737 Main Street, No. 600
Riverside, California 92502

Reported By:
KATHERING G. SMITH,
CSR NO. 1685

PROCEEDINGS OF FEBRUARY 10, 1983

THE COURT: Good afternoon.

MR. MAGERS: Good afternoon, Your Honor.

THE COURT: In the matter of People versus Diaz, appearances for the record, please.

MR. MAGERS: Pat Magers appearing for the People.

MR. LEE: Deputy Public Defender John Lee appearing with Mr. Diaz, Your Honor, who's present in custody.

MS. LAHTI: Assistant Public Defender Pat Lahti with Mr. Diaz.

THE COURT: All right. Mr. Lee, I notice you have a tape recorder.

MR. LEE: Yes, Your Honor. There is no tape in it.

THE COURT: Very well.

MR. LEE: I propose, assuming we get that far, to enter into evidence a tape recording as an exhibit in opposition to Mr. Magers's publicity motion. That's the only purpose for it being here, so that the Court might examine the tape itself.

THE COURT: There is a right to have a tape recorder, but I need to know about it.

All right. Our next step, before anything, is to continue with Mr. Diaz's previous matter concerning counsel. And I think I just will hear that, rather than go in chambers, we'll just do this. If you'll remain in the vicinity, we'll call you as soon as we can.

The bailiff will close the court, please.

(Whereupon there was a closed session which was not dictated, and the following proceedings took place in open court.)

THE COURT: All right. I'm no longer a magistrate. I am a judge of the Superior Court. We have some motions in front of us. There's a 995 motion. There are some motions under 1538.5. There is a nonstatutory motion on the part of the People to set aside the previous order of the Court sealing the transcript of the preliminary hearing.

MR. MAGERS: That is correct.

THE COURT: In sequence, do you have any thoughts?

MR. MAGERS: I would suggest that we deal with the People's nonstatutory motion for release of the transcripts.

THE COURT: Mr. Lee?

MR. LEE: Your Honor, it's my understanding that the firm of Thompson & Colegate has entered ostensibly on behalf of the public and filed papers. Procedurally, perhaps we can address that. I do have some comments regarding that. And we can then determine, I think, perhaps if we can determine who the parties are who have standing, as it were, on this particular motion first and then get into the substantive motion itself.

THE COURT: I think that's appropiate.

There has been filed, as of February 7, 1983, a document with the caption of this case, but attorneys for applicant Press-Enterprise Company.

Do you want to be heard with regard to that, Mr. Lee?

MR. LEE: Yes, Your Honor. Mr. Boyd, who filed the papers for, I will call the Press-Enterprise the interveners in this matter, served both myself and Mr. Magers with a copy. And I've had an opportunity to briefly review it.

My position at this point is that they do not have standing to be heard on this matter. They are alleging the right of the people of California, and I believe that the rights and interests of the people of California are amply represented by the presence of Mr. Magers.

I am not familiar with any section of the Penal Code which provides for the appearances of a third party, save for sentencing matters. And I believe that any arguments that can be presented in this matter can be amply done through Mr. Magers.

THE COURT: Is there anyone here from the firm of Thompson & Colegate?

MISS WATERS: Yes, Your Honor, Sharon Waters on behalf of Press-Enterprise.

THE COURT: Miss Waters, do you want to be heard? And I will hear from you. But I want to make it clear at this point how I am hearing you. I am hearing you kind of as a special appearance as to whether or not you can even appear.

MISS WATERS: Yes, Your Honor, I understand that.

THE COURT: Do you understand that?

MISS WATERS: Yes, Your Honor.

THE COURT: There has been filed — And let me point out immediately that the mere fact that a clerk in a ministerial function accepted for filing some document does not mean that it is necessarily properly before the Court. But I do have a document by your office on this subject.

I note in reading this document that it's generalized authority and no specific authority for this procedure,

that is, that any individual can appear as, quote, surrogate for the public and be heard.

Do you have any authority for that particular point?

MISS WATERS: Other than what is contained in the papers, no, Your Honor. We believe that the case of, recent United States Supreme Court case of Richmond Newspapers, which designates the press as the spokesman for the public, is sufficient authority. That in combination with Penal Code Section 868 which now creates a right in the public to attend the preliminary hearing absent a showing of prejudice to the defendant, creates the right, the right of the press as a spokesman for the public.

THE COURT: All right. So that I am clear on the record on this, I am not going to permit you to appear, but in the sense of what we know appearances to be, a party or an intervener by statute or an amicus curiae by leave of court, or perhaps there are some others that I can't think of.

But at this point the District Attorney — I have one People of the State of California client in this case. It's called the plaintiff. It's represented by the District Attorney. And I do not recognize an appearance as a party of any other individual or entity as surrogate for the People.

On the other hand, I have read and reviewed your points and authorities, and I will consider them, and I will consider your argument and point of view in the matter.

MISS WATERS: That would be fine, Your Honor. We appreciate that.

THE COURT: Mr. Lee?

MR. LEE: Your Honor, if the Court is disposed to consider the papers submitted by the Press-Enterprise, I

have additional comments with regard to the points and authorities that they have submitted to the Court.

I would like to add to my previous comments that, assuming that they do have the right to even appear on this particular matter —

THE COURT: I haven't given them that right. I'm hearing them as something special, that I haven't got a name of.

MR. LEE: Okay. They're not appearing.

THE COURT: But I have considered what they have to say.

MR. LEE: Well, in considering what they have to say, Your Honor, the points and authorities rely considerably on revisions to Penal Code 868. However, Penal Code 868 is more than just that one sentence that they are relying upon. That same section of the Penal Code continues to say that where the magistrate is satisfied that the right to a fair trial may be jeopardized — and I'm paraphrasing very broadly here you —

THE COURT: I'm aware of that, counsel.

MR. LEE: That Mr. Diaz's right to a fair trial may be compromised and he may close the preliminary hearing and order the sealing of the transcript.

THE COURT: I do not find any merit in the position of this applicant. However, let's get this in the correct order. There is a moving party here.

MR. LEE: Yes.

THE COURT: Let's hear from the moving party. Let's hear from you in opposition, and then we'll hear something on the other side.

MR. LEE: Very good, Your Honor.

THE COURT: The moving party has the burden, I think.

MR. MAGERS: Thank you, Your Honor. Initially, pursuant to 868 of the Penal Code, Judge Dabney did in fact close the courtroom and seal the transcript. At that particular time, in the beginning of July, 1982, Judge Dabney, through his discretionary ruling, found that it would be in the best interests of Mr. Diaz to do what he then did.

I am assuming that that motion was granted, because Judge Dabney was anticipating a day-by-day account of the proceedings. And, of course, it lasted some 41 days.

At that point in time at the preliminary hearing there were many representatives of television stations and radio stations and newspapers present, and he began anticipating a day-by-day account, and subsequently at that point in time he exercised his discretion and granted the motion pursuant to 868.

However, that's been approximately, what, nine months ago. The case has received very little publicity. And pursuant to the argument I utilized last time, the People do have a right to know, and it's a balancing interest. And because of the passage of time, we feel that the interests of the public has dulled in this case, and we feel that the public's entitled to a summary of what transpired during the nine-week preliminary hearing that took place last summer.

And additionally I am anticipating this case to go to trial some time in the future, not the immediate future, based upon what the defense attorneys have represented to me. And at this particular point in time the People feel that the public's right to know outweighs any possible denial of fair trial that Mr. Diaz may at some point be subjected to.

As far as Mr. Lee's moving papers in opposition, basically he's arguing venue, and I don't think that's necessarily a proper argument. I think the argument is whether or not Mr. Diaz's right to a fair trial will produce some prejudice by releasing the transcript, which is a factual account of admissible evidence of the crimes charged. And based upon that argument, Your Honor, People would ask that not only the transcripts be released but also my points and authorities in opposition to Mr. Lee's motion to dismiss the case, that motion that I filed contains a 40-page summary of the facts, and we would urge the Court to release that to the public, as well.

There's no statutory or case law on a point which would prohibit the Court from doing that. That document was a public document. However, because of the circumstances involved, we felt, the District Attorney's office, felt that we should maintain the status quo until Your Honor made a decision. And we would ask that both documents now be released. Thank you.

THE COURT: All right. Now, Mr. Lee, he's made a motion. You can reply.

MR. LEE: Yes, Your Honor. In my papers that I filed with the Court I expressly reserved the right to introduce additional exhibits and other evidence on this matter. I have submitted to the clerk of the court a total of five exhibits identified A through E and would like to describe them very briefly.

It is true that on the first day of the preliminary hearing Judge Dabney made a ruling, and he based his ruling to close the preliminary hearing on the case of Gannett vs. DePasquale, which is a United States Supreme Court case. Judge Dabney discusses it very briefly on pages 11 and 12 of the transcript, which the Court has a copy of.

Following the conclusion of the preliminary hearing Mr. Hewatt, speaking for Mr. Diaz, moved under the authority of Rosato vs. Superior Court, which is cited in my points and authorities, and also Cromer vs. Superior Court. And I have supplied as Exhibit B that portion of the transcript to the Court.

Additionally, we have Exhibit C, which is certain —

THE COURT: Why don't we take them one at a time.

MR. LEE: Okay.

THE COURT: Any objection to — What is your first exhibit? Exhibit A, is that what you're calling them?

MR. LEE: Exhibit A, Your Honor.

MR. MAGERS: Which —

No, Your Honor.

THE COURT: All right. A will be admitted.

Let's see. You had also done B?

MR. LEE: I believe Exhibit B, Your Honor, is the defense request at the conclusion of the preliminary hearing, pursuant to, under the authority of Rosato and Cromer, but Rosato and Cromer are implied in invoking the authority of Section 938.1b which authorizes the magistrate to seal the transcript. And Exhibit B, I believe that incorporates pages 4235 on through 4237. We have submitted to the clerk and identified that as Exhibit B.

THE COURT: May I see those?

Any objection?

MR. MAGERS: No objection.

THE COURT: You have marked the bottom of page 4235?

MR. LEE: Yes, Your Honor. I have taken the liberty to highlight those portions of the actual conversations that I felt were most material to this motion.

THE COURT: Well, the clerk will be directed to now — we have a pair of scissors — cut off the part that you want and put it in. I don't want any more of that on this page until I make a ruling on the other motion. This being the part of what your motion goes to.

So it is the last sentence on page 4235 and the first, down through line 12 on page 4236. Well, all of page 4236 and 4237. So the only part that would be admitted would be the last line of 4235. Cut off and hand back to counsel and expunge from the record at this point anything above that.

MR. LEE: Thank you, Your Honor.

We have also submitted as Exhibit C the part of the comments of the magistrate following or concurrent with the actual findings of the Court, and that is reported on page 4224, principally, 4224, lines 14 through 27, Your Honor.

THE COURT: Now, that was the part I was looking for. Maybe you want to think a moment as to whether or not you want — The motion is to seal the transcript; it's not to seal any proceedings. And I haven't any intention of sealing any proceedings. And if you want to put this much of the proceedings in, then what have we got a motion for on the other stuff?

MS. LAHTI: Could we briefly confer?

MR. LEE: Your Honor, in order for me to properly argue the motion, these exhibits are necessary. And if we are successful, we intend to request the Court to seal these exhibits, particularly Exhibit C.

THE COURT: All right.

MR. LEE: It is difficult to — I don't want to —

THE COURT: You have at least thought about what the problem is, and you have hoped for solutions. You don't know whether I'm going to do it or not, but you have a hoped for solution.

MR. LEE: Yes, I do, Your Honor.

THE COURT: Proceed. It will be admitted.

MR. LEE: As Exhibit D we have submitted a loose-leaf which contains a collection of newspaper articles, and they begin from approximately April of 1980 and proceed in more or less consecutive month-by-month sequence. The last article in the file is an article which appeared in the, I believe it's the Press-Enterprise some time in December of 1982, just this past December.

THE COURT: Any objection?

MR. MAGERS: No objection.

THE COURT: Be admitted.

MR. LEE: And the last exhibit, identified by the letter E, Your Honor, is a tape of a news broadcast this past Friday, I believe. It's designated 2/4/83; that was broadcast by the radio station KCKC.

THE COURT: Do you have a transcript of that?

MR. LEE: I do not, Your Honor. However, I can provide the Court with the actual tape that we made from it.

THE COURT: I will require a transcript.

MR. LEE: Okay.

THE COURT: I have fallen into the problem of having to listen to tapes and not having transcripts.

MR. LEE: In that case, Your Honor, if, with the Court's permission, we could withdraw the exhibit and put together a transcript for the Court for resubmission perhaps at a later date.

THE COURT: Might as well get it now, because if this is to be reviewed, the Fourth District Court has a rule that there must be a transcript. And after having had some very unsatisfactory experience with having only the tape recently, I will also require a transcript.

MR. LEE: Very good, Your Honor.

Your Honor, I think the —

THE COURT: What I'm saying is, Mr. Lee, you would have to have made that transcript, anyway. We are in the Fourth District, and they will not take a tape without a transcript.

MR. LEE: Very good, Your Honor.

To respond directly to Mr. Magers's previous comments, I would think that in addition to the arguments that I've presented in our opposition papers, there is a case directly on point. That is the case of Gannett vs. DePasquale. And in that particular case, to summarize it very briefly, one of the issues presented to the Court was whether or not there was a public right to be present in pretrial proceedings.

We are not at this stage, at this point, where Mr. Diaz is requesting a closure of his actual trial before a jury.

The case upon which the Press-Enterprise counsel relies upon discusses the closure of a trial. That is Richmond Newspapers vs. the Commonwealth of Virginia, discusses the closure of the trial itself.

At this point in time we are in a definite pretrial status. We are engaged in various pretrial motions. And that

issue as to whether or not the people have a right to appear in those proceedings was directly addressed by the Supreme Court in Gannett. In Gannett the Court determined that because of the nature of the pretrial proceedings, that many evidentiary issues are heard and hopefully resolved prior to trial, that certain constitutional issues, such as the admissibility of evidence under either the Fourth Amendment, perhaps the Fifth Amendment, are litigated in pretrial proceedings, that to permit the public to come in and view those proceedings, to be educated, as it were, as to those proceedings would run the risk — and they use the standard of a reasonable likelihood — if it would create the reasonable likelihood that as a result of the publicity generated by pretrial proceedings, if that would jeopardize Mr. Diaz's right of a fair trial because of the constant inculcation into the prosective jury panel of various facts, allegations, et cetera, about the case, which may be legally inadmissible, then the Court is well advised and, in fact, must, as an affirmative duty to protect Mr. Diaz's right to a fair trial, close the pretrial proceedings.

And I think that a reading of DePasquale would indicate that those proceedings must be closed from the moment of the preliminary hearing, which has already been done by Judge Dabney, all the way through and up to the actual calling of the first witness, at which point Mr. Diaz's public trial would actually commence.

I think that the authority, also, of Corona vs. Superior Court again cited quite extensively and quoted extensively in my moving papers, that Mr. Diaz's case falls very easily, very apparently into those kinds of cases where, even though the media may not come out with an intent to damn him prior to trial, the fact remains that with the constant feeding of little bits and pieces of the issues that will be part of the trial, that there runs the risk of, as the

Court in Corona characterized it, circumstances which tend to create a belief in his guilt. And that is a matter which is properly and will only be before the jury sworn to try Mr. Diaz's case.

I think also that the remarks of the magistrate, were they to be made the subject of commentary for the public, would also severely jeopardize Mr. Diaz's expectations of a fair trial.

In essence, Your Honor, I believe that in addition to everything that I have raised in my moving papers, which I'm sure the Court has read, that Gannett vs. DePasquale is the controlling case. We are in a pretrial situation, that the extent of the publicity in this particular case, the Court will note from an examination of Exhibit D that even the tangential matters involved in this case, the fact that Mr. Diaz has had to endure changes of counsel since his initial arraignment on the felony complaint in Municipal Court through things which are totally unrelated to his case, such as the fact of the marriage of co-counsel Mr. Hewatt on this matter, that becomes all part of the public comment.

The Court will notice that contained in the Exhibit D are articles indicating that Mr. Diaz's wife was briefly held on a traffic warrant. That was apparently reported some time during April of 1982. The prospect of collateral investigations regarding the conduct of the defense has also been commented upon.

So we have, Your Honor, a situation where anything, whether directly or tangentially involving Mr. Diaz, is something which the media, whether it be the Press-Enterprise, whether it be the electronic media, is something that they are constantly interested in. That at every opportunity that something arises that the media feels may be worthy of comment, worthy of broadcast, worthy

of printing, they do in fact do so, and in every instance we are creating a situation where, although perhaps — but I seriously doubt — that the public interest in this case is dulled. I think the only reason it is dulled is because of the discretion of counsel for both sides and the fact that Judge Dabney's previous order sealing the transcript remains in full force and effect.

I think that once that guarantee, that protective order is lifted, we will be treated to a blow-by-blow account of the preliminary hearing.

The Court is also aware that the purpose of a preliminary hearing is merely to establish probable cause to bind the defendant over. It is not a determination of guilt, and it is not a determination even of innocence but is merely a determination as to a basic legal sufficiency.

Given the fact that we have an extensive preliminary hearing that the People had several months to prepare, investigate their case, why, it is natural that the result of the preliminary hearing, and given the relative late date that the defense begins, that we're going to have quite a bit of prejudicial material but arguably admissible material, appearing in the preliminary hearing transcript. And there is no way — and the Supreme Court of both this state and of the United States has recognized it is very, very difficult to cleanse the minds of the prospective jurors of the effects of pretrial publicity.

In this particular case Mr. Diaz is facing capital charges. The California Supreme Court in Martinez has specifically said that, taking into account the kinds of pretrial publicity and the consequences to the defendant, that the balance must be struck in the favor of Mr. Diaz. Thank you, Your Honor.

MR. MAGERS: Just briefly, Your Honor. As far as the facts in the preliminary hearing are concerned, it was

admissible evidence, competent, substantial, admissible evidence. And basically that's what will be released, a factual account of admissible evidence.

The defense filed a 1538.5 to supress evidence they contend was illegally seized. That's fine. It has nothing to do with the preliminary hearing testimony or evidence. The evidence secured at Mr. Diaz's house pursuant to a search warrant was not introduced at the preliminary hearing. The facts were ruled upon by Judge Dabney. And if there are any newspaper accounts concerning the preliminary hearing transcript, it would be a factual recitation of what happened. And we will submit it on that.

THE COURT: Do you want to be heard?

MISS WATERS: Yes, Your Honor. The constitutional right of the public, it is true, is primarily directed at the public trial. But we believe that Penal Code Section 868 reverses the role at the determination of whether to open or close the hearing.

The burden in this situation is now on the defendant to prove that it will prejudice his rights. The presumption is now in favor of openness in public and recognition of the public's right to know and their need to know.

It is true in this situation there is a lot of public interest, and it is exactly this type of case which requires the information to be made available to the public, so that the public understands all that is going through with the trial, and that they have a full understanding of the judicial process.

In this situation the preliminary transcript from my understanding is quite extensive. And it is doubtful that all of the blow-by-blow accounts that Mr. Lee is referring to, that you would have a factual recitation of the preliminary evidence.

Also, Your Honor, the seven articles that have been printed so far, two of which have been at the instigation of the defense counsel, have occurred over a six-month trial period. And it is doubtful that the preliminary transcript, once published in shortened form in the newspaper, will have any serious effect on the defendant's ability to get a fair trial.

Mr. Lee's affidavit in this respect is nothing more than conclusionary. What has occurred in the past is no indication of what will occur in the beginning. And in this situation it is important to recognize the public's right and interest in attending the preliminary trial by making the transcript available to them at this stage.

The prejudice at this point cannot be determined. What has taken place is not indicative of what will take place. And the remedies available to the defendant — although we would be reluctant to see a motion for change of venue granted — are still available in the event the publicity that the defendant is so concerned about is so extensive.

But in the final analysis the burden is on the defendant, although the People are the ones making the motion in this situation, in light of the recent amendment in Penal Code Section 868. Thank you, Your Honor.

THE COURT: Anything further?

MR. LEE: Yes, Your Honor. First, I feel it necessary to respond to the 868 issue. I think the 868 issue is, one, moot. It is, two, a qualified right. Three, the record of the preliminary hearing, the comments of Judge Dabney, clearly indicate that exercising his discretion on July 6th, when the very first day of this preliminary hearing he made the determination upon then available information that Mr. Diaz's right of a fair trial would be unduly compromised by opening the preliminary hearing. And I think what any party attacking the 868 ruling by Judge

Dabney must do is to show an abuse of discretion. And I have not seen any evidence indicating that there has in fact been an abuse of Judge Dabney's discretion with regard to that particular ruling.

It is true that Mr. Diaz does arguably have a right to a change of venue. However, Mr. Diaz also has a right, a correlative right of having the case tried in this county where he and his counsel believe, based upon present information, that he may expect a full and fair trial, based upon fairly admissible evidence, fully litigated by both sides before a jury empaneled and seated in this county. That, granted, we could go to another county, but why not obey that traditional common law rule that a crime shall be tried in the venue that it was allegedly committed.

And that is perhaps an unusual position for defense to take at this point in time, but it is a position that we intelligently take, based upon present information. And a lot of our present feeling that we have a reasonable expectation of such a fair trial relies upon the continued status quo, that the evidence which is being challenged through the 995 now pending before this Court, through the 1538.5, and other motions which I can assure Your Honor and Mr. Magers will be raised prior to the date of trial, can be fully litigated, that any exposure, pretrial exposure of that, of those proceedings, will render the efforts that Judge Dabney has attempted, that counsel has attempted to this date, moot, because we will totally wash away all the benefits of having the public, having had this lengthy period of time to sort out, to perhaps forget to a certain degree, some of the, what I would characterize as somewhat outrageous remarks that were made very early in the beginning of this investigation.

There were press conferences being conducted by representatives of the coroner's office, of the District Attorney's office, very early on. There were comments to the

press on both sides. And it very easily raises the spector that the respective sides will try the case in the papers. And that is not in the best interests of Mr. Diaz, certainly not in the best interests of the judicial system that we all adhere to.

I think that Mr. Diaz's right to trial must be a fair one, not in the press and not based upon happenstance of what the media chooses to publish, what they choose not to publish. And the only summary that is presently available immediately for public consumption is that that has been filed by Mr. Magers for the Court pursuant to the 995 motion.

And Mr. Magers, representing the People, certainly will state the case fairly, I'm sure. I'm not saying that he is misrepresenting anything to the Court. But he is, nevertheless, an advocate for one party. And for that statement consisting of 40 some odd pages very detailed and quite lengthy, to go into the public domain, just creates too great a risk. It creates that reasonable likelihood of compromising Mr. Diaz's right to a fair trial.

And I would point out to the Court that the, I believe it is the Supreme Court has held in Martinez that a reasonable likelihood means more probable than not. Which suggests to me that a prima facie showing which I believe the exhibits will demonstrate, a prima facie showing that there is a reasonably likelihood of not receiving a fair trial, that Mr. Diaz is entitled to the appropriately phrased protective orders, and that the standard for protective orders, which is essentially what we're asking for at this point, is the same standard as for change of venue. And I believe the authority for that is set out in Younger vs. Superior Court. I believe I did not cite Younger in my points and authorities. However, I'd be glad to supply the Court with the citation. That the standard for requesting protective pretrial orders, perhaps sometimes inartfully called gag orders, is the same as the standard for change of venue.

THE COURT: You cited it at the bottom of page 11.

MR. LEE: Summarizing, Your Honor, I believe that after the Court examines the exhibits that we have submitted, that there is in fact a reasonable likelihood that any pretrial disclosure will introduce into the public comment facts, statements, circumstances which tend to create the belief, an unjustified belief but nevertheless a belief in the guilt of the accused. That because of this possibility, that it prejudices Mr. Diaz's right to be tried properly by admissible evidence and argument before a fair and impartial jury, in other words, a jury who can legitimately respond to the Court's questions, to counsel's questions, that know they have no preconceived concept as to the guilt or innocence. That Mr. Diaz, because this is a capital case, that is a crucial factor to be weighed, and that the resolution of any doubt be in his favor because of the very special nature of this particular prosecution.

And, finally, under the authority of Gannett that there is no constitutionally recognized right of public attendance in pretrial proceedings. And unless something horribly catastrophic should happen between now and the date of trial, Your Honor, I can assure the Court that the trial of Mr. Diaz will be a full one and will be a public one. But I will not, and I cannot countenance any suggestion that the areas which must be litigated prior to trial be produced for public comment and to the detriment of Mr. Diaz. Thank you.

THE COURT: Anything further?

MR. MAGERS: Just one comment, Your Honor. I don't have to remind the Court that there is no gag order in effect on this case. And I have certainly chosen not to divulge to the media by interview or otherwise as to what

the evidence was at the preliminary hearing or to summarize to any representative of the news media what the testimony was. I chose not to do that. However, I could have, and I still can.

People feel that the best vehicle to allow the public to know what's going on is to divulge the facts in the case as adduced at the preliminary hearing and not speculation or conclusion.

And as far as Mr. Lee's arguments, they would best be addressed to a change of venue. And I don't think they're necessarily appropriate at this stage.

At some point in time if Mr. Lee feels that Mr. Diaz's rights to a fair trial have been compromised in this jurisdiction, then he has the vehicle to apply to this belief. I will submit it on that.

THE COURT: Well, I think Mr. Lee is going a little bit further. Nothing new to you on this.

He is also asserting he has a right to a trial in this county and not having to go because of prejudicial pretrial publicity, and that this Court has a duty to look forward to the posture of the case at the time of trial and see whether or not he can have a trial in his county of residence, where his witnesses are, where his loved ones are, since he's in custody.

MR. MAGERS: Is —

THE COURT: It's the opposite side of that. In other words, he is saying he should not be compelled — True, as you've indicated, frequently the approach is, "Well, if it doesn't work out right, you can always delay it long enough, or you can kick it over and try it in another county." And he says, "I don't want to delay it any further, and I have a right to try it in this county."

MISS WATERS: Mr. Lee's pointed out that Judge Dabney's earlier ruling, he did find that an open preliminary hearing would prejudice his rights.

It was also noted in Mr. Lee's moving papers that no opposition was made by the District Attorney at the earlier request to close the hearing, which is exactly why the Press-Enterprise and the press in general feel they have a right to voice their position in this respect, those situations where the D.A. does not have —

THE COURT: Well, you are aware that Mr. Bauman was allowed to be heard in regard to that.

MISS WATERS: Yes, Your Honor.

THE COURT: So press did get a say in before Judge Dabney, at least from what I read from the transcript.

MISS WATERS: Additionally, the Gannett decision primarily addressed whether the public had a Sixth Amendment right to attend the trial. And it's true the Gannett decision decided that there was no public Sixth Amendment right to attend the trial.

With respect to the issue of whether it was a First Amendment right, I believe the Court did not actually address that question but merely said that even if there was one to attend the public trial, that this was a preliminary hearing and further that any interest of the public was recognized, because a transcript was made available.

And I think that situation is analogous here. The distinction between making the transcript available and having the blow-by-blow account that Mr. Magers (sic) has referred to is a very important distinction, because a daily recounting of what is occurring in the preliminary hearing would obviously or could obviously affect the defendant's right to a fair trial.

A summary of the facts which was prepared of a several month preliminary hearing, the impact is going to be lessened, the public's right to know will be fulfilled, the impact on the defendant will be limited. If there's any impact at all, which is, as I stated earlier, at this point we're merely speculating. Until the articles are written, until the impact is determined, at this stage from Mr. Lee's investigation, the defendant will have a fair trial in here.

The press is not interested in changing the venue in this situation any more than the defendant is, because it would be necessary for them to schedule coverage for a year and a half in another jurisdiction, which would obviously be a great expense to them. But it is the principle involved here of the public's right to know, the harm of releasing the transcript is certainly not as great as would have been if the preliminary hearing had been open at all times. Thank you, Your Honor.

THE COURT: Well, the Court feels compelled under the authority of Gannett to consider several points. First of all, that this is pretrial proceedings, and it's not trial. That whether it is inflammatory type of publicity or merely repetitive factual comments, it has an effect upon the community mind which affects the community pool from which the jurors are selected.

The Court has no objection to the public's right to know. And I think Mr. Magers's initial observations, that as to the evidence he produced, it was as factual as it could be. Just, we'll use — It's not extremely inflammatory or exciting type of facts in this.

But I find it quite easy under Gannett to see that there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's

right to a fair and impartial trial. And I will order that the transcript remain sealed.

I believe all concerned here — This Court certainly is aware that the defendant has interjected a new concept of a defendant's right, at least as far as I know, and yet it's not a new one. We all know that a defendant has a right to be tried in the jurisdiction in which the act occurred. And as an arraigning magistrate I've had to inform defendants of that right many, many times. He's just carrying that to the ultimate now. He has a right to be tried in this jurisdiction. And so far at this point he's saying, "There being no more publicity from this point than there is, as things now stand, I think I can stay here. And please, judge, don't do something that will impact upon my trial, so that I can't have a fair and impartial trial here, so that I have to go somewhere else. Because if you send me somewhere else, I've been told it's going to be about an 18-month's trial, I've got umpteen witnesses that I'll have to have there, I am in custody because this is a special circumstances case, I do not have a right to bail, and my loved ones would have to come to me, and there's so much publicity in the south here that, pray tell, where would you send me except hundreds of miles away?"

It is quite easy for me to find that there is a reasonable likelihood that making all or any part of the transcripts public might prejudice the defendant's right to a fair and impartial trial. The decisions, authorities, supplied by defense counsel also give me the implicit authority, and thereunder I do exercise inherent authority to prevent the same mischief.

I will order sealed that portion of the District Attorney's motion that was a synopsis of the facts. Now, when saying that, let me hasten to say that there was nothing untoward in the District Attorney's doing that. Well, I have had to go through the transcript. Nevertheless, his

synopsis is of extreme value, and certainly nowhere am I suggesting that the District Attorney made the synopsis so that, although the transcript was sealed, he could get around it in that fashion.

MR. LEE: Well, Your Honor, —

THE COURT: I am not suggesting that at all.

MR. LEE: And I think it ought to be quite perfectly clear, neither are we.

THE COURT: All right. But I am ordering it sealed. I am ordering the evidence, the documentary evidence you have submitted in support of this motion, insofar as it contains extracts from the transcript of the preliminary hearing, sealed.

I have not done a gag order. I do not intend to impose one. I hope I do not.

I simply bring out again that the defendant is bringing forward a new emphasis upon his right to be tried in the jurisdiction in which the incident occurred. And should state acts jeopardize that, I am assuming that his defense attorney is knowledgeable enough to make motions on it. Although, like I say, I do not have a gag order.

All right. Next matter? Let's take a moment. Let's take a brief recess. I have a sentencing, do I not? All right. Let's take about a 10- or 15-minute recess.

(Whereupon a recess was taken in the proceedings.)

MR. LEE: Your Honor, just one more matter, as a matter of housekeeping on the last motion. I think it was implicit in the Court's comments that subsequent pretrial hearings would also be closed. But I don't recall hearing that made explicit. Perhaps for purposes of clarification —

THE COURT: I have not made that order.

MR. LEE: We would then, Your Honor, as a logical extension — because I really cannot see arguing many of the evidentiary issues and particularly the 995 argument that is certainly upcoming and the 1538.5, without referring directly to substantial portions of the preliminary hearing transcript and other aspects of the case.

THE COURT: Well, I've read your 995 motion, and it doesn't look to me like you're going to go through a combing through the details of it. There's a couple areas of law but not an awful lot of facts that would be disclosed by your motion, as I understand your points and authorities and your statement of the case in support of it.

The traverse, I don't know that the search warrant and return has ever been sealed.

MR. MAGERS: The 1538.5 that Mr. Lee has filed is a renewal of a motion that was filed in the Chino Municipal Court. And that was fully litigated in open court. All that information has been disseminated to the public a year and a half, two years ago, and the affidavit in support of the search warrant was made public two years ago.

MR. LEE: Your Honor, Mr. Magers is correct as to his statements there. However, once again, we're running into a situation of having these issues brought up again before the public's eye.

And as to each, what we would request leave of the Court to do is that at each successive time that we are presenting one motion or the other to the Court, if we could at that time address the Court as to the issues of whether or not that proceeding should be closed to the public.

THE COURT: Well, you have that right, and you are making it now.

MR. LEE: Yes, Your Honor.

THE COURT: As to this.

MR. LEE: My feeling, Your Honor, is that Gannett does fairly well cover, implicit in Gannett is the fact that it covers all pretrial proceedings. And I feel that this case is fairly well controlled by the dictates of Gannett.

THE COURT: I am not going to exclude the public from ongoing motions. I cannot find that that would have a reasonable likelihood of impairing this trial. The contrary would. If I were to seal it, it would just be a reason to exclude the public from an ongoing proceeding now after preliminary hearing, where there is a statutory right, would simply be to make news in and of itself, which is equally, I think, is even more likelihood of preventing your client from being able to have a fair trial. And balancing that against the right of the public in ongoing criminal proceedings, at least at this point I'm going to deny your motion.

MS. LAHTI: Am I clear with the Court that this is something that you will hear us, renewed?

THE COURT: Each time.

MS. LAHTI: Thank you. And I would like the Court to know that part of our difficulty is anticipating what we found ourselves doing this afternoon, arguing in the abstract. We presented the Court with documentary items and could not refer specifically without disclosure. And we're going to be facing the same situation with Mr. Magers's summary and —

THE COURT: On the 995 I think we can handle it.

October 4, 1983

Honorable Justices of the Fourth District
Court of Appeals, Division Two
303 Third Street
San Bernardino, California

Re: Press-Enterprise Company vs. Superior Court of the State of California, In and For the County of Riverside, Respondent, Robert R. Diaz, Real Party in Interest; 4 CIV 29785, County Number CR-19899.

Your Honors:

The above matter has been calendared for hearing before this court on October 5, 1983 following the submission of briefs by counsel for Petitioner, Real Party in Interest and Amicus. Prior to oral argument of the action, this court should be appraised of factual events that may affect the court's resolution of the matter now pending.

On September 30, 1983, the Honorable John H. Barnard, trial judge of the underlying criminal prosecution, accepted Mr. Diaz's waiver of jury trial pursuant to Article I § 16 and granted his request to proceed to trial with Judge Barnard as the trier of fact for both guilt phase and penalty phase, if necessary. Following the trial court's acceptance of the waiver of jury trial, Judge Barnard indicated his intention to lift his order closing the preliminary hearing transcript in Mr. Diaz's case. He expressed the opinion that such order was now moot in light of the waiver and he retained jurisdiction to lift his previous order. Defense counsel requested maintenance of the status quo until the proceedings before this tribunal are completed. Judge Barnard agreed to maintain the status quo until October 5, 1983 at 1:30 P.M. whereupon he would hear additional argument from counsel.

At first blush the aforementioned waiver may render the instant proceedings for mandamus moot, this is not, however, the contention of counsel for the Real Party in Interest, Robert R. Diaz.

The California Supreme Court has held in numerous instances that issues presented in a given case are not rendered moot despite events occurring during the pendency of the matter where the issues are of broad public interest. See *In re William M.*, 3 Ca. 3d 16, 23 (1970). this exception to the traditional mootness doctrine has been applied in actions involving writs. See Willaim M., supra, (habeas corpus); *Zeilinga v. Nelson,* 4 Cal.3d 716, 620 (1971); *Kirtowsky v. Superior Court,* 143 C.A.2d 745, 749 (1956) (mandamus); *United Farm Workers v. Superior Court,* 14 Cal.3d 902, 906-907 (1975) (prohibition).

It is readily apparent from the record of the instant case that all parties would concede that the issues raised herein are of broad public interest, i.e. Petitioner's First Amendment claims versus Mr. Diaz's specific (and all persons similarly situated) right of trial in an untained atmosphere. Although orders as that challenged here are infrequent, the effect is far reaching in its potential to alter defense strategies and tactics and their availability is a crucial item in a trial counsel's quiver to ensure the preservation of his client's rights of due process.

Counsel, therefore, urges this court to retain its jurisdiction of the instant petition and further render such orders and opinions as may be consistent with resolution of the issues raised herein. Should the court require

additional authority or argument on the mootness issue adequate time to prepare same is hereby requested.

Respectfully,

JOHN J. LEE
Deputy Public Defender
Counsel for Robert R. Diaz
Real Party in Interest

(5)

No. 84-1560

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,
VS.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF PETITIONER ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the public's right of access to criminal proceedings, guaranteed by the United States Constitution First Amendment, extends to pretrial proceedings, in particular, preliminary hearings.

2. Whether the standard for closure of preliminary hearings under *California Penal Code,* Section 868 set by the California Supreme Court violates the constitutional rights of the public, including the press.

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BRIEF OF PETITIONER ON THE MERITS

ORDERS BELOW

The Order of the California Supreme Court was reported and appears in the Joint Appendix. (See Joint Appendix, page 4). The order of the California Court of Appeals, Fourth District, Division Two was reported and appears in the Appendix to the Petition for Writ of Certiorari. (See Appendix, page E-1.)

JURISDICTION

The Order of the California Supreme Court was entered on December 31, 1984, and became final on January 31, 1985. Under 28 U.S.C., Section 1257(3), this Court's jurisdiction is invoked. On October 15, 1985, this Court entered an order granting a hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 6:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment 14, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On December 23, 1981, a complaint was filed in the municipal court, Riverside Judicial District in the County of Riverside, State of California against ROBERT RUBANE DIAZ, alleging twelve counts of murder. The People alleged that the murders had been committed

within the meaning of *California Penal Code,* Section 190.2(a)(3), warranting the death penalty.

Approximately six months later, on July 6, 1982, the preliminary hearing in the matter of *People v. Robert Rubane Diaz* commenced in the Riverside Municipal Court. At that time, the defendant moved to exclude the public under *California Penal Code,* Section 868. The magistrate granted the request and closed the hearing. (J.A., p. 21).

The preliminary hearing lasted a total of 41 days. The defendant was held to answer on all counts alleged in the criminal complaint and the reporters' transcripts of the preliminary hearing were sealed until further order of the court. (J.A., p. 37).

On January 21, 1983, the People moved in superior court to have the transcripts of the preliminary hearing released to the public. On February 7, 1983, petitioner filed an application to join in support for release of the preliminary hearing transcripts. On February 10, 1983, the defendant filed opposition, claiming that the release of the transcripts would result in prejudicial publicity, jeopardizing the defendant's right to a fair and impartial trial.

In support of his opposition, defendant submitted to the trial court approximately eighty (80) articles (see Exhibit "C" to the Petition for Writ of Mandate). Well over half of these articles were published in May and June of 1981 when the mystery of the numerous but unexplained hospital deaths first came to light.

Other articles were based on interviews with defendant in which he discussed his $1,000,000.00 civil rights suit and asserted his innocence in connection with the deaths in question. Many of the articles submitted by defendant

were published in newspapers outside of Riverside County.

News coverage diminished significantly after the defendant's arrest in November, 1981. Many of the articles which were published after the arrest focused on allegations of mismanagement in the public defender's office and alleged misuse of funds in connection with the defendant's case.

From the conclusion of the preliminary hearing through the hearing on the motion to release transcript on February 10, 1983, the petitioner's reporting of this case and anything related to it consisted of seven stories, which appeared in the second section of the daily newspapers published by petitioner in Riverside County. These stories included the magistrate's holding the defendant to answer on all counts, the defense counsel's publicly expressed concern that the magistrate might have been biased in his conduct of the closed pretrial proceeding, the postponement of the arraignment, the marriage of the lead defense counsel to his investigator, the scheduling by the respondent court of eighteen months for the trial, sundry civil lawsuits filed in the wake of this case and an unusual altercation in the courtroom between two defense counsel in the presence of court personnel and other observers.

On February 10, 1983, the superior court trial judge found that the information contained in the transcript was neither "inflammatory" nor "exciting" but there was, nonetheless, "a reasonable likelihood that release of all or any part of the transcript might prejudice defendant's right to a fair trial." (J.A., p. 60). The trial court denied the request to unseal the transcripts.

The Court of Appeal of the State of California, Fourth Appellate District, Division Two, denied petitioner's petition for writ of mandate for review of the trial court's actions. The supreme court, however, granted the petition and ordered the matter retransferred to the court of appeal, with directions to issue an alternative writ of mandamus and to set the matter for hearing.

The court of appeal, on January 12, 1984, discharged the alternative writ of mandate and denied issuance of the peremptory writ. The court determined that there was no constitutional right of public access to preliminary hearings.

Petitioner again sought review in the California Supreme Court. On December 31, 1984, the court ruled that the First Amendment of the United States Constitution does not provide a right of access to preliminary hearings. It further determined that the statutory right of access under *California Penal Code,* Section 868 could be denied upon a showing of a "reasonable likelihood of substantial prejudice" to the defendant's right to a fair trial.

Prior to oral argument in the appellate court, the defendant waived his right to a jury trial. (J.A., p. 65). Thereafter, before the court of appeal rendered its decision, the trial judge released the transcripts, finding no likelihood of prejudice in light of the defendant's waiver. The court of appeal retained jurisdiction, nonetheless, determining that although rendered technically moot, the issue was of statewide concern and "capable of repetition yet evading review."[1]

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[1]Because the transcripts were released in October of 1983, the issue of possible mootness arises. However, jurisdiction is not defeated if the underlying dispute is one "capable of repetition, yet evading review." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982). The controversy in this case is one which is capable of repetition in that it reasonably can be assumed that petitioner and the public will be denied access to other preliminary hearings. It can also be reasonably assumed that such denial will likely evade review.

SUMMARY OF ARGUMENT

The First Amendment right of public access to pretrial proceedings, specifically the preliminary hearing, in a criminal case is the primary issue before the Court.

This constitutional right implicitly was denied recognition originally by the magistrate in closing the preliminary hearing and thereafter by the trial court in keeping the transcripts of that proceeding sealed. The trial court's action in refusing to release the transcripts, based on the belief that such release would create a reasonable likelihood of prejudice to the defendant's fair-trial rights, was subsequently sustained by both the court of appeal and the California Supreme Court. In each instance, the appellate court in question denied the existence of a constitutional right of public access to preliminary hearings.

The denial was based primarily on the courts' belief that decisions of this Court precluded extension of such a right outside of the trial. But none of this Court's decisions specifically limit the First Amendment right of access to the trial proceeding or precludes its recognition in a pretrial context. To the contrary, the reasoning of this Court in recognizing the constitutional right of access to trial proceedings applies with full force to the preliminary hearing which has the procedural attributes of the trial itself.

The values inherent in open trials are also compelling at the preliminary hearing stage. Access to this proceeding, which traditionally has been open to the public, furthers the societal interests of accurate fact-finding and avoidance of misconduct as well as the structural values of educating the public on matters of great public concern and inspiring public confidence in our criminal justice system. In fact, with relatively fewer criminal cases actually going to trial, these values are more compelling at the preliminary hearing stage.

In addition to denying the existence of a constitutional right of access to preliminary hearings, the California Supreme Court determined that closure of this proceeding was appropriate upon a showing of a reasonable likelihood of substantial prejudice to the defendant's fair-trial rights. This standard is constitutionally deficient. It fails to require trial courts to consider alternatives to secret proceedings and fails to require trial courts to make express findings that closure is the only effective means for protecting against a perceived harm. As such, the California standard allows for closures that violate the First Amendment right of public access.

The public's right of access to preliminary hearings should be established by a decision of this Court, along with the appropriate standard for closure of such proceedings.

ARGUMENT

I

THE FIRST AMENDMENT GUARANTEES PUBLIC ACCESS TO PRELIMINARY HEARINGS IN CALIFORNIA CRIMINAL CASES

A. Characterizing a Proceeding as Pretrial is not Dispositive of the Issue of the First Amendment Right of Access

The California Supreme Court erroneously determined that the constitutional right of public access arising under the First Amendment does not extend to preliminary hearings. The court's ruling was based on its belief that opinions of this Court precluded extending the right of access beyond trial proceedings. In reaching this conclusion, the supreme court ignored the analysis of this

Court supporting the First Amendment right of access to trial and jury selection and failed to consider whether this reasoning supports a right of access to preliminary hearings.

In *Gannett v. DePasquale,* 443 U.S. 368 (1979), this Court specifically reserved the issue of whether a right of access would exist under the First Amendment, stating, "We need not decide in the abstract, however, whether there is any such constitutional right." *Id.,* at 392.

This Court first addressed and began to define the First Amendment right of access in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980) wherein the Court stated:

> "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ."
> *Id.,* at 580.

This historic pronouncement was reaffirmed in *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), wherein this Court upheld the First Amendment right of access to criminal trials, striking as unconstitutional a mandatory closure statute. "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.,* at 606, 607.

In *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984), this Court found that this constitutional right of public access extends to the *voir dire* proceeding, finding that, "[t]he process of jury selection is itself a matter of importance, not simply to the adversaries, but to the criminal justice system." *Id.,* at ____. Noticeably absent

from the Court's opinion was any discussion of whether jury selection is part of the trial or pretrial.

In each instance wherein this Court has found a First Amendment right of access to a court proceeding, it has based its decision on a determination that public access furthers vital societal interests and "plays a particularly significant role in the functioning of the judicial process and the government as a whole," *Globe Newspaper,* 457 U.S. at 606.

The constitutional right of public access cannot be arbitrarily foreclosed to the preliminary hearing simply by characterizing the proceeding as pretrial. "[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." *Press-Enterprise,* 464 U.S. at ____ (Stevens, J., concurring). Rather the proceeding itself must be examined to determine if the principles sustaining the right of access to other court proceedings support access to the proceeding in question.

B. The Preliminary Hearing in California Plays a Pivotal Role in the Effective Administration of Criminal Justice

Under California law, a preliminary hearing has all of the procedural attributes of the trial itself. As the California Supreme Court described the "impressive array of procedural rights" afforded the defendant, the preliminary hearing includes a determination of probable cause "before a neutral and legally knowledgeable magistrate, representation by retained or appointed counsel, the confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence." *Johnson v. Superior Court,* 15 Cal.3d 248, 256, 539 P.2d 792, 799, 124 Cal.Rptr. 32, 37 (1975) (Mosk, J., concurring).

At the preliminary hearing, the defendant has a right to present an affirmative defense such as alibi, self-defense or entrapment and may develop that defense either through the cross-examination of prosecution witnesses or the testimony of defense witnesses. *Jennings v. Superior Court,* 66 Cal.2d 867, 428 P.2d 304, 59 Cal.Rptr. 440 (1967). California courts have even held that a pre-preliminary hearing "discovery motion" can be pursued to develop evidence to support an affirmative defense at the preliminary hearing, *People v. Justice Court (DeRoco),* 118 Cal.App.3d 78, 173 Cal.Rptr. 851 (1981), and that a defendant is entitled to a continuance of the preliminary examination to obtain a material witness for an affirmative defense, *People v. Iocca,* 37 Cal.App.3d 73, 112 Cal.Rptr. 102 (1974). Where a government confidential informant may be a material witness, the defendant is entitled to a hearing as to whether the identity of the informant must be disclosed. *California Evidence Code,* Section 1042.

The benefits afforded an accused by the preliminary hearing are so substantial, the California Supreme Court held a denial of a preliminary hearing to a defendant who has been indicted by a grand jury violates the equal protection clause of the California Constitution. *Hawkins v. Superior Court,* 22 Cal.3d 584, 586 P.2d 916, 150 Cal.Rptr. 435 (1978). Thus, every defendant charged with a felony offense in California, whether by information or by grand jury indictment, has an absolute right to a preliminary hearing.

California applies the provisions of its Evidence Code regarding the admission and exclusion of evidence at the preliminary hearing. *California Evidence Code,* Section 300; *Rogers v. Superior Court,* 46 Cal.2d 3, 291 P.2d 929 (1955). The California courts insist that no evidence be admitted at the preliminary hearing which would not be

admissible at the trial.[2] *Id.; People v. Schuber,* 71 Cal. App.2d 773, 163 P.2d 498 (1945). Even judicially created evidentiary rules are applied just as strictly as at trial. The corpus delicti of the offense, for example, must be established by evidence independent of the defendant's extra-judicial statements, even at the preliminary hearing. *People v. Ramirez,* 91 Cal.App.3d 132, 153 Cal.Rptr. 789 (1979); *Jones v. Superior Court,* 96 Cal.App.3d 390, 157 Cal.Rptr. 809 (1979).

The constitutional exclusionary rules are fully applied at California preliminary hearings, making a motion to suppress evidence a standard part of the bill of fare. The California Penal Code specifically authorizes motions to suppress tangible evidence obtained by search or seizure to be made at the preliminary hearing:

> If the property or evidence relates to a felony offense initiated by complaint, . . . the defendant may make the motion at the preliminary hearing in the municipal or justice court but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

California Penal Code, Section 1538.5(f).[3] Constitutional objections can also be raised to the admissibility of confessions and the admissibility of eye-witness identifi-

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[2]An exception to the rule prohibiting the use of hearsay at the preliminary hearing is *California Penal Code,* § 872(b). This section allows the prosecution to use hearsay evidence in the form of sworn written declarations of certain witnesses. This exception only applies to the testimony of witnesses who are neither the victim of the crime nor providing an eyewitness identification of the defendant. Even with this exception, however, the defendant retains the right to call witnesses including those whose declarations have been submitted, for purposes of cross-examination. *California Penal Code,* § 872(c).

[3]Compare Fed. R. Crim. Proc. 5.1(a):

cation testimony. *People v. Malich,* 15 Cal.App.3d 253, 93 Cal.Rptr. 87 (1971).

The powers available to the magistrate presiding at a California preliminary hearing are indistinguishable from the powers conferred by California law on trial judges. The magistrate determines the credibility of witnesses and determines what weight to give their testimony, "and neither the superior court nor the appellate court may substitute its judgment as to such question." *DeMond v. Superior Court,* 57 Cal.2d 340, 345, 368 P.2d 865, 19 Cal.Rptr. 313 (1962).

The California magistrate is empowered to order an action dismissed "in furtherance of justice." *California Penal Code,* Section 1385, (amended in 1980 to abrogate *People v. Peter,* 21 Cal.3d 749, 581 P.2d 651, 147 Cal.Rptr. 646 (1978)). The factual findings of the magistrate may require the reduction of the charges to a lesser-included offense, or in a case where special circumstances permitting the imposition of the death penalty are alleged, that the case proceed as a non-death penalty case. *Ghent v. Superior Court,* 90 Cal.App.3d 944, 153 Cal.Rptr. 720 (1979). In cases which can be prosecuted as either a misdemeanor or a felony under California law, the magistrate at the preliminary hearing is empowered to reduce the level of the crime from felony to misdemeanor, even over the objection of the prosecutor, thus disposing of the charges with finality. *California Penal Code,* Section 17(b)(5); *Esteybar v. Municipal Court,* 5 Cal.3d 119, 485 P.2d 1140, 95 Cal.Rptr. 524 (1971); *Malone v. Superior Court,* 47 Cal.App.3d 313, 120 Cal.Rptr. 851 (1975).

"Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination."

While the ultimate determination of guilt or innocence is obviously not made in the preliminary hearing, in all other respects, the preliminary hearing closely resembles the trial itself. Accordingly, the benefits derived from open trials are equally compelling at the preliminary hearing stage.

C. Access to Preliminary Hearings Furthers Important Societal and Structural Interests

Important benefits are derived by allowing the public to attend court proceedings. Open court proceedings are a necessity in the functioning of a democratic society. The benefits derived and the interests served by allowing access to criminal trials are also obtained by allowing access to preliminary hearings.

> Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. *Gannett,* 443 U.S. at 383.

Indeed, the need for accurate fact-finding, avoidance of misconduct, abuse and perjury, and the ferretting out of additional witnesses with relevant testimony may be more compelling at this earlier stage in the criminal process as it could result in fewer unwarranted prosecutions. The importance to the innocent defendant of an accurate and early determination cannot be overstated. The decision to hold the defendant over for trial may "imperil the suspect's job, interrupt his source of income, impair his family relationships or otherwise impose significant restraints and burdens on the suspect," the most drastic being pretrial confinement, *Gerstein v. Pugh,* 420 U.S. 103 (1975). The benefit to society in an accurate determina-

tion of probable cause is efficient use of criminal justice resources and avoidance of unnecessary expense.

Public access "fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper,* 457 U.S. at 606. "For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably." *Richmond Newspapers,* 448 U.S. at 594 (Brennan, J., concurring). Having the ability to make an independent assessment that sufficient cause exists to impose the burden of a criminal trial upon another member of society, all members of the public will have greater confidence in their criminal justice system. The public may well perceive closed hearings as secret, the proceedings hidden from it by government authorities seeking to cover wrongdoing. "[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise,* 464 U.S. at ____.

Public access also includes a "community therapeutic value." *Id.,* at ____.

> Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self help' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers . . . it is not enough to say that results alone will satiate the natural community desire for 'satisfaction'.

Richmond Newspapers, 448 U.S. at 571. No greater frustration of this "fundamental, natural yearning to see justice done — or even the urge for retribution" (*Id.,* at

571), can occur than when, after a secret preliminary hearing, the suspect is released.

Public access also educates the public, a necessary component of effective self-government, *Richmond Newspapers,* 448 U.S. at 572. "Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' " *Globe Newspaper,* 457 U.S. at 604. "Thus to the extent that the First Amendment embraces the right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.,* at 604, 605. This concept is not just theory. There are many examples where public scrutiny of the judicial branch has resulted in political action in California.

In 1982, Californians adopted an initiative measure known as the "Victim's Bill of Rights", which radically changed the administration of criminal justice by limiting exclusionary rules, reformulating the insanity defense, establishing new standards for bail and the admissions of prior convictions, and giving victims a right to participate in sentencing procedures. See, *Brosnahan v. Brown,* 32 Cal.3d 236, 651 P.2d 274, 186 Cal.Rptr. 30 (1982).

In 1983, an unsuccessful effort was made to qualify another initiative measure for the ballot which would have, among other reforms, eliminated preliminary hearings where a grand jury indictment has occurred, admitted hearsay evidence at preliminary hearings, and excluded evidence having no direct bearing on the issue of probable cause. Miller, *A Reasoned Approach to Criminal Justice Reform,* Los Angeles Lawyer, September 1983, page 6.

One particular preliminary hearing has focused great public attention and debate, spawning numerous legislative proposals. The preliminary hearing in *People v. Buckey, et al.*,[4] a child molestation case, commonly referred to as the McMartin Pre-School Case, has been underway since August, 1984. As a result of public awareness of this hearing, the California Legislature has enacted numerous statutes impacting on preliminary hearings.[5]

A measure is currently before the state legislature to amend the state constitution to abrogate the *Hawkins* ruling and require defendants indicted by a grand jury to proceed directly to trial without a preliminary hearing. Constitutional Amendment Number 10, sponsored by Senator Ed Davis, California Legislature, 1984-85 Session. In order for this ongoing public debate about the criminal justice system to be informed, public access is clearly essential.

[4]Los Angeles Municipal Court Case Nos. A-750900 and A-753005.

[5]Senate Bill 46, Chapter 43 of the Statutes of 1985, allowed for special videotaping procedures of the testimony of victims of child abuse. Assembly Bill 804, Chapter 122 of the Statutes of 1985, took corrective action on a 1984 statute of limitations code section. Assembly Bill 31, Chapter 308 of the Statutes of 1985, allows for the interruption of a preliminary hearing in child abuse cases, thus creating an exception to the "one session" rule. Assembly Bill 30, Chapter 467 of the Statutes of 1985, amended the Penal Code to provide for two support personnel instead of one to accompany a victim during the course of testifying. Assembly Bill 762, Chapter 1010 of the Statutes of 1985, provided for enhancement of penalties in child abuse cases where the perpetrator of the crime was a child care provider. Assembly Bill 33, Chapter 1097 of the Statutes of 1985, provided for "targeted prosecution program" in child abuse cases. Senate Bill 301, Chapter 1172 of the Statutes of 1985, amended the statute of limitations in child abuse cases. Assembly Bill 32, Chapter 1174 of the Statutes of 1985, specifically authorized changes in the courtroom such as the judge removing his robe, rearrangement of furniture, etc., to make the courtroom less intimidating to child abuse victims. The foregoing is not an exhaustive list of legislation following in the wake of *McMartin*.

Secret hearings have the ill effect of prompting second-hand, inaccurate accounts of events. Even though these accounts later may be corrected, timeliness and opportunity may be lost. This sequence even occurred in the instant case. Defense counsel publicly misquoted the magistrate's comments at the end of the closed hearing, indicating his opinion that these comments showed an improper bias. The account was not accurate but the transcript had been sealed and the judge declined to comment. Soon after, the judge was considered for elevation to the superior court. Clearly a judge's performance in a lower court at a time he is being considered for elevation would be a matter of legitimate public interest. Yet public debate on this issue was stunted by secrecy. (See, September 1, 1982 article attached as Exhibit "C" to Petition for Writ of Mandate and J.A., p. 27.). It was not until later that the transcript was released.

The importance of public access to the preliminary hearing is further underscored by the fact that very few criminal cases actually proceed to trial. For the vast majority of cases in California, the preliminary hearing is the only litigation of the factual events underlying the prosecution.[6]

In the 1983-84 fiscal year, the most recent year for which statistics are available, the California superior

[6]Another provision added as a result of the Victim's Bill of Rights was a restriction on plea-bargaining in serious felony cases after an information has been filed. *Penal Code*, Section 1192.7. Although its full impact has not yet been determined, logically this restriction will result in even more cases being disposed of at the preliminary hearing stage and thus even fewer cases going to trial.

courts disposed of 66,534 defendants accused of felonies. However, only 6,710 were disposed of by trials.[7] During that same time period, California municipal and justice courts disposed of 98,338 felony charges. Of these, a total of 52,119 defendants had preliminary hearings and, in over 90% of these, the defendant was held to answer in superior court.[8] Thus, one trial took place for every eight preliminary hearings.[9]

Often providing the sole opportunity for public scrutiny of our criminal system, the preliminary hearing is an increasingly important proceeding.

> Although not perceived as such by most magistrates, the preliminary hearing may now be the most important procedural mechanism for an equitable administration of the current plea bargaining system. Certainly, given the disposition of most criminal defendants to bargain their case out before trial, the magistrate now stands as the sole judicial officer in the system whose discretionary power could effectively be used to counter-balance the dominion of the prosecutor at the preliminary hearing.

Note, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice,* 28 Stan. L.Rev. 1207, 1223 (1976).

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[7]1985 Annual Report Judicial Council of California, pp. 116-119.

[8]1985 Annual Report Judicial Council of California, pp. 140, 145.

[9]The Riverside County superior courts, during the same time period, disposed of 1,426 defendants accused of felonies but only 162 of these were disposed of by trials. At the same time Riverside municipal courts disposed of 3,355 defendants of which 1,383 had preliminary hearings. Of these, 999 defendants were bound over for trial. Thus, in Riverside County, approximately 1 trial took place for every 6 preliminary hearings.

As the preliminary hearing in California assumes a pivotal role in the effective administration of criminal justice, the need for public access to this proceeding intensifies. The mistaken assumption that the values inherent in constitutional access are adequately served by allowing such access only to trials is inconsistent with the decisions of this Court and could undermine the very reasons for which this right exists.

D. In The United States Preliminary Hearings Traditionally Have Been Public Proceedings

This Court has used history as a guide in determining whether the First Amendment right of access applies to particular judicial proceedings and has found that both the *voir dire* as well as the trial historically have been public proceedings. *Richmond Newspapers,* 448 U.S. 550; *Press-Enterprise,* 464 U.S. 501. While historical references to public pretrial proceedings may be scarce, the information available lends support for the conclusion that pretrial proceedings traditionally have been open.[10]

As Amici more fully delineate, the preliminary hearing in America after independence is critically distinguishable from its early English counterpart. The sixteenth century English "preliminary hearing" was inquisitorial rather than adjudicatory, with the magistrate serving as investigator, operating out of the public's view without the panoply of rights for the accused. 5 W. Holdworth, *A History of English Law,* 169-77 (2d Ed. 1937). Thus, reference to early English common law is of little assis-

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[10]The absence of voluminous historical materials has not caused this Court concern on past occasions. See, e.g., *Press-Enterprise,* 464 U.S. at ____. "That there was little in the way of a contemporary record from this period is not surprising . . . why trouble to record that which every village elder knows?" *Richmond Newspapers v. Virginia,* 448 U.S. at 565, n. 5.

tance in determining whether the right of access extends to the preliminary hearing as it has evolved in the United States.

Early in the American experience, as an outgrowth of the Bill of Rights, the preliminary hearing became a judicial proceeding in which the magistrate acted as a neutral fact-finder rather than an arm of the prosecution. R. Pound, *Criminal Justice in America* 80 (1930). Concurrently, this proceeding was opened to the public and has remained so almost uniformly. Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L.Rev. 397, 407 (1961).

Despite the "near uniform practice [of open pretrial proceedings] in the federal and state court systems" (*New Jersey v. Williams,* 93 N.J. 39, ____, 459 A.2d 641, 649 (1983)), eight states, including California,[11] incorporated the Field Code provision giving the defendant the ability to close preliminary hearings. This aberrational provision, according to one writer, is probably best explained as resulting from Field's "personal antipathy toward newspapers." Geis, *supra,* at 408.

Regardless of the reason for its inclusion in the statutes in these jurisdictions, the fact remains that even in this handful of states, the provision has been rarely invoked. Geis, *supra,* at 407. Thus the practice in these few states, historically and currently, is consistent with that in the majority of jurisdictions — that of open preliminary hearings.

It is apparent that as preliminary hearings became adjudicatory proceedings, taking on the attributes of the

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[11]The California statutes establishing the preliminary hearing originally provided only for the exclusion of witnesses under certain circumstances. 1849 Cal.Stat., Ch. 119, § 161. In 1851, the provision was added which provided that the magistrate should exclude the public upon the request of defendant. 1851 Cal.Stat., Ch. 29, § 161.

trial, American jurisdictions drew from the lessons of the history of open trials and the recognized values inherent in that process and logically called for public preliminary hearings. Today, the inherent values of open judicial proceedings continue to apply to preliminary hearings.

II

THE STANDARD FOR CLOSURE SET BY THE CALIFORNIA SUPREME COURT FAILS TO RECOGNIZE AND PROTECT THE PUBLIC'S CONSTITUTIONAL RIGHT OF ACCESS

Because the California Supreme Court failed to recognize the public's constitutional right of access as mandated by this Court, it also failed to establish adequate requirements under *California Penal Code,* Section 868 that must be met before closed preliminary hearings are permitted. Section 868 states that "the examination shall be open and public" unless "exclusion of the public is necessary to protect the defendant's right to a fair and impartial trial." The supreme court determined that closure is "necessary" upon a showing of "a reasonable likelihood of substantial prejudice."

Petitioner acknowledges that but for the existence of a First Amendment right of access to these proceedings, the issue of the standard under Section 868 would not be properly before the Court. However, should this Court determine that the First Amendment right of access does in fact extend to preliminary hearings, then the standard set by the California Supreme Court is clearly unconstitutional.

This Court has held that "openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to

be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise,* 464 U.S. at ____ .

Similarly, in *Richmond,* after discussing available alternatives to closure, this Court stated, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers,* 448 U.S. at 581. "The circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper,* 457 U.S. at 606, 607.

This same standard has been applied by this Court to closure of a pretrial proceeding.

> Under *Press-Enterprise,* the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller v. Georgia, 467 U.S. 39, ____ (1984).[12]

There is a significant difference between petitioner's proposed standard and that adopted by the supreme court. By finding that closure is permissible upon a

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[12]While the Court in *Waller* was addressing the defendant's Sixth Amendment right to a public trial, it nonetheless determined that the interests inherent in open trials were no less compelling in a pretrial suppression hearing.

simple showing of "a reasonable likelihood of substantial prejudice", the court overlooked the fact that the standard proposed by petitioner is part of a three-prong test set by the Ninth Circuit in *United States v. Brooklier,* 685 F.2d 1162 (9th Cir. 1982).

In *Brooklier,* the Ninth Circuit adopted the standard advanced by Justice Blackman on behalf of himself and three other Justices in *Gannett,* 443 U.S. 368, and determined that this standard is met if the following is demonstrated:

> (1) A substantial probability that irreparable damage to [the defendant's] fair-trial right will result from conducting the proceeding in public;
>
> (2) A substantial probability that alternatives to closure will not protect adequately his right to a fair trial; and
>
> (3) A substantial probability that closure will be effective in protecting against the perceived harm.

Id., at 441, 442.

Some federal circuits apparently disagree on the showing of prejudice to be made ("likely to be prejudiced" *(United States v. Chagra,* 701 F.2d 354, 365 (5th Cir. 1983)); "significant risk of prejudice" *(Application of the Herald Co.,* 734 F.2d 93, 100 (2nd Cir. 1984))). But they agree that in addition to a showing of potential prejudice, before resorting to closure, it must be established that other means to protect against the harm would be inadequate and that closure would be effective. See also, *United States v. Criden,* 675 F.2d 550 (3rd Cir. 1982).

The standard set by the California Supreme Court is deficient in that it fails to incorporate the following important safeguards:

(1) It does not require the trial court to consider reasonable alternatives to closure;

(2) It does not require closure to be narrowly tailored and no broader than necessary to protect the overriding interest;

(3) It does not require the trial court to determine that any form of closure will protect an overriding interest; and

(4) It does not require the trial court to make findings adequate to support the closure order.

The failure to incorporate these additional components leaves the California standard constitutionally inadequate.

That the California standard allows for secret proceedings without adequate justification is most pointedly established by the facts of this case. At the time respondent court considered the request to release the transcripts in February of 1983, the preliminary hearing had been concluded nearly six months previously. While the trial date at that time was approximately six weeks away, shortly after denying the request to release the transcripts, the trial court continued the trial to October, nearly eight months later.

Over half of the eighty newspaper articles submitted by defendant were nearly 21 months old. Many of the articles did not involve potential trial evidence. Many were from newspapers circulated outside Riverside County. The trial judge additionally considered the information in the transcripts. Of this, he said "[I]t was as factual as it could be.... It's not extremely inflammatory or exciting type of facts in this." (J.A., p. 60)

Thus, at the time release of the transcripts was requested, the information in the transcripts lacked the

timeliness element of intense newsworthiness and the jury selection process was far enough away to allow memories to fade. Nonetheless, the trial court, with the only showing of publicity being a collection of mostly old and often irrelevant newsclippings, found a "reasonable likelihood" that publication of purely factual matters would prejudice the defendant's right to a fair trial. This would have been clearly inadequate to prove "a substantial probability of irreparable harm."

Nor did the trial court consider any alternatives to complete closure or make any findings that closure would protect effectively against the risk of prejudice. Under the three-prong test advanced by petitioner, the trial court would not have been able to justify keeping the entire transcript sealed.

One of the reasons advanced by the California Supreme Court justifying its loose standard is that alternatives to closure often will be inadequate or cause inconvenience or expense to the parties or the courts. (J.A., p. 15) The fact that alternatives may not be adequate in a particular case does not warrant elimination of this essential component in general. This Court has determined that there are alternative means available to protect the accused's right to a fair trial which must be considered before resorting to closure. These include intensive voir dire, additional peremptory challenges, jury admonitions, continuances, changes of venue, and partial closure of the proceeding. See, e.g., *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). Admittedly some of these alternatives may cause inconvenience to participants of the trial but none are "beyond the realm of the manageable." *Richmond Newspapers,* 448 U.S. at 581. Indeed, inconvenience or expense to the participants appears to be a feeble rationale to justify secrecy in violation of constitutional rights. These motives pale in significance when one considers the

important structural and societal interests which are impaired by secret proceedings.

This Court repeatedly has held that proceedings closed to the public are to be tolerated only in "the rarest of circumstances." The California standard for closure under *Penal Code,* Section 868 actually encourages trial courts, acting in understandable concern for the defendant's fair-trial right, to close courtroom doors upon the slightest showing of possible prejudice. As such, it is constitutionally intolerable.

CONCLUSION

In a historic pronouncement, this Court in *Richmond Newspapers* declared a First Amendment right of access by the public to criminal trial proceedings. This watershed case and its progeny, *Globe Newspapers* and *Press-Enterprise,* in clear language set forth the values of an open trial system which warrant constitutional protection. A close analysis establishes, however, that the criminal justice system in America, and specifically in California, is not a trial system but predominantly a pretrial system. To guarantee the substantial benefits of openness, this Court must now declare this right attends pretrial proceedings, particularly preliminary hearings.

Respectfully submitted,

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*Petitioner and counsel for petitioner gratefully acknowledge the assistance of Gerald F. Uelmen, J.D., L.L.M., Professor of Law, Loyola Law School, Los Angeles, California, in preparation of this brief.

(12)

No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF ARGUMENT

The sole constitutional issue raised by petitioner is whether the public has a First Amendment right of access to preliminary hearings in criminal cases.[1] Although peti-

[1]It should be noted that although the petition in this case goes to the issue of public access to preliminary hearings, respondent superior court did not close or refuse the press and public access thereto. The preliminary hearing was held by a magistrate of the *municipal court* who, under *California Penal Code*, Section 868, closed the preliminary hearing at the request of the defendant, without objection by the district attorney, and only after the magistrate found that

tioner recognizes that a preliminary hearing is not a trial, it argues that this Court should establish a federal constitutional right of public access to such a hearing because it is procedurally similar to a trial, most criminal cases are disposed of at the preliminary hearing stage, and there are great societal benefits to be derived from affording the public complete access. Such analysis, however, serves to improperly place the interests of the public in a non-adjudicatory hearing above the fundamental constitutional rights of an accused.

While there may be some procedural similarities between a trial and a preliminary hearing, functionally the two are dissimilar and serve vastly different societal goals. The purpose of trial is to adjudge guilt and innocence. The purpose of preliminary examinations is to protect the liberty of the accused. The right to a preliminary examination, whether public or private, is a right personal to the defendant which guarantees an opportunity to be free from unwarranted criminal prosecutions and the attendant publicity flowing from allegations of criminal conduct.

In addition, California has statutorily balanced the interests of the public in access to preliminary hearings with an accused's Sixth Amendment right to a fair and impartial trial. In California, the examination shall be open and public except when it would deprive an accused of a fair trial. The determination of the procedure of pretrial hearings is a procedural matter traditionally handled by the states.

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closure was necessary to protect the defendant's Sixth Amendment right. The sole act of the respondent *superior court* was its initial refusal to release the sealed transcript of the hearing; however, when the defendant waived his right to a trial by jury, respondent court, *sua sponte*, immediately released the transcript.

Finally, a determination that there is a constitutional right of access on petitioner's theory would injudiciously compel extension of the right to all pretrial proceedings. If, as petitioner suggests, openness fosters confidence in the criminal justice system and is required at that point in the system where the vast majority of criminal complaints are disposed of, the public should necessarily have unlimited access to the office of the district attorney because it is there that the fundamental decision to prosecute or not to prosecute is made. Yet, such access would constitute an unwarranted and disruptive intrusion into the process of criminal justice.

ARGUMENT

I

The California Standard Governing Public Access To Preliminary Hearings Embodied In California Penal Code, Section 868 Comports With The First And Sixth Amendments To The United States Constitution.

The California Legislature initially adopted *California Penal Code,* Section 868 as a rule of criminal procedure designed to protect the rights of criminal defendants. In its opinion in this case (J.A., pp. 4a through 17a), the Supreme Court of California in exploring *California Penal Code,* Section 868 referred to its opinion in *San Jose Mercury-News v. Municipal Court,* 30 Cal. 3d 498 (1982), wherein it articulated the policy factors favoring open preliminary hearings as well as the "several concerns militating against a public preliminary hearing and against requiring defendant to establish that prejudice will occur from a public hearing." (J.A., pp. 13a through 15a). Importantly, the California Supreme Court in *San Jose Mercury-News* pointed out that not only inflammatory

publicity or misleading publicity could threaten the impartiality of the jury pool, but that even factual, relevant reporting could have the same effect. *San Jose Mercury-News,* 30 Cal. 3d at 512. (J.A., p. 14a).

Within two months after the decision in *San Jose Mercury-News,* in apparent recognition of the public interest in openness, the California Legislature amended *California Penal Code,* Section 868 to its present form. In so doing, it created a statutory right of access to preliminary hearings turning upon a standard of necessity for the protection of the criminal defendant's fair trial right. Thereafter, the Supreme Court of California, in the instant case, interpreted that standard in terms of a "reasonable likelihood of substantial prejudice" and concluded that "the primacy of the right to fair trial viewed in the light of the policy consideration in favor of closure set forth above, requires us to conclude that a defendant who has established a reasonable likelihood of substantial prejudice after all of the evidence is considered may not be compelled to risk his fair trial right by an open hearing." (J.A., p. 16a). In creating a statutory right of access to preliminary hearings and prescribing the development of a standard for closure of such proceedings, the California Legislature acted in accord with principles set forth in *Hayes v. Missouri,* 120 U.S. 68, 70 (1886), wherein this Court stated that "to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the Legislature, but is among its highest duties." As the California Supreme Court noted in its opinion in this case, "[t]he legislative history of the amendment to *California Penal Code,* Section 868 shows that the Legislature intended the courts to determine the appropriate standard [for closure of the preliminary hearing]." (J.A., p. 12a).

The statutory access right and judicially determined standard of application relative to *California Penal Code,* Section 868 not only protect the defendant's fair trial right but also recognize and protect the public interest in the openness of such proceedings. Clearly, neither *California Penal Code,* Section 868, nor the California Supreme Court's decision in this case deprive either the press or the public of the right of access to preliminary hearings. Petitioner, however, prefers to see this right characterized as one of constitutional dimension, requiring the application of a different standard for closure.[2] Such characterization is inappropriate.

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[2]Petitioner's reliance on *Waller v. Georgia,* 467 U.S. 39 (1984), and the closure standard cited therein of *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984), is ill founded. Both *Waller* and *Press-Enterprise Co.* are inapposite with regard to the instant case for the following reasons: 1) *Waller* concerns the closure of a pretrial suppression hearing over the defendant's objection, a situation which is the reverse of the one which occurred in the instant case; and 2) a pretrial suppression hearing is very different from a preliminary hearing. As the California Supreme Court noted in *San Jose Mercury-News, supra,* pretrial suppression hearings may be conducted after the defendant has been bound over for trial. *San Jose Mercury-News,* 30 Cal. 3d at 513. The suppression hearing in *Waller* occurred after the jury had been empanelled and thus was virtually part of the trial phase of the criminal prosecution. The *Press-Enterprise Co.* standard as a standard for *trial* closure was fashioned to accommodate a constitutional standard and societal interests in trials and proceedings in close proximity to trials. Such a standard, however, is inappropriate for application to the accusatory phase of a criminal prosecution where preservation of the defendant's fair trial right is clearly paramount. *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979).

II

The Preliminary Hearing Is Functionally Different Than A Trial And Protects Different Societal Goals.

Petitioner accepts, as it must, that a preliminary hearing in a criminal proceeding is not a trial. Rather, it is an accusatory stage whereat a neutral magistrate determines if there is probable cause to bind the accused over for trial. The magistrate's function is to determine whether there is probable cause to believe that a crime has been committed and whether the accused committed it. *Johnson v. Superior Court,* 15 Cal. 3d 248 (1975). Although the examination can perform various functions, its fundamental purpose is to prevent innocent persons from being deprived of liberty founded on baseless allegations. *People v. Elliot,* 54 Cal. 2d 498, 504 (1960).

Although a trial, which determines guilt or innocence, and a preliminary hearing, which simply determines whether a trial should occur, are functionally quite different, petitioner attempts to blur the distinctions between the two by arguing that the preliminary examination has all of the "procedural attributes" of the trial itself. The argument is that if the two proceedings are procedurally the same, then the two proceedings should be treated the same for constitutional purposes. The result, petitioner asserts, is that an open preliminary hearing can thereby provide the same societal benefits derived from open trials. The argument fails.

Certainly there are procedural standards between a trial and a preliminary hearing. At the examination the accused is given a vast array of constitutionally guaranteed safeguards such as the right to counsel and the right to cross-examine witnesses. But the facts that the accused may have similar rights and that the proceeding is conducted formally do not compel the conclusion that a preliminary hearing is akin to a trial.

Historically, the preliminary hearing has served as a tool to protect an accused from the power of the government. Although there may be some disagreement among scholars as to when a preliminary hearing was first known at common law, this Court has found that the prophylactic nature of the examination was well known. "At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest." *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). The reason was to allow for someone independent of police and prosecution to determine probable cause as to whether the accused should be bound over for trial. *Gerstein,* 420 U.S. at 117, citing *Shadwick v. City of Tampa,* 407 U.S. 345 (1972).

In California this concept of a preliminary hearing conducted by a neutral magistrate for the protection of the accused has a long history. In 1851, California adopted the Field Code of Criminal Procedure, with only minor amendments. Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L. Rev. 397, 410 (1961). California codified the Field Code in 1872 with the adoption of *California Penal Code,* Section 868, and that Section remained virtually unchanged until 1982 when the State Legislature significantly expanded its provisions to require open and public examinations unless such openness violated an accused's right to a fair and impartial trial.

The preliminary examination, then, functionally serves to protect the rights of the accused. It guarantees that the accused will be afforded a public hearing on the issue of probable cause; it does not and has never been intended to serve as a basis for guaranteeing the public a right of access. This is not surprising because a similar process of

protecting the accused, the grand jury, has traditionally operated in secret.[3]

A trial, on the other hand, functionally, serves to protect the rights of the defendant *and* the public. It is a full-blown court proceeding where the issue of guilt or innocence is tested before a jury and ultimate factual and legal issues are determined beyond a reasonable doubt.

To argue, as petitioner does, that a preliminary hearing "closely resembles" a trial (P.B., p. 13), is to misconstrue the functional purposes and effects of the two proceedings.

III

No Constitutional Right Of Access To Preliminary Hearings Should Be Established On The Ground That Not All Cases Go To Trial.

It is clear that an important component in the effective administration of the criminal justice system is the openness of criminal trials. As this Court has often recognized, the knowledge that the public may attend criminal trials serves to enhance the public perception that there is basic fairness in the criminal justice system. *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, at ____.

Petitioner argues, however, that because the preliminary hearing in California has assumed a "pivotal role in the effective administration of criminal justice, the need

[3]If a constitutional right of access to preliminary hearings is established, the next logical issue will be whether the grand jury similarly should be open to the public. While the two proceedings are in some respects different, the function they perform is the same, and it does not appear that there is any rational basis to differentiate between the two.

for public access to this proceeding intensifies." (P.B., p. 19). The argument is that the cathartic value of open criminal trials would be lost if, after a closed preliminary hearing, a suspect were released. (P.B., p. 15).

Petitioner notes that the preliminary hearing is more pivotal now because in 1985 in Riverside County, California, only one trial took place for every six preliminary hearings. (P.B., p. 18, fn. 9). Petitioner fails to cite any historical statistics to buttress the argument that the preliminary hearing to trial ratio is significantly different now than in the past and, thus, fails to justify the conclusion that the preliminary examination has in fact assumed a more "pivotal role." But even if petitioner provided supplemental statistics, the fact that fewer cases, by percentage, go to trial may be explained by any one of a number of reasons. For example, prosecutors today may choose to file complaints only in those cases where the probability of conviction is high. More importantly, the fundamental flaw in any attempt to use statistical data to support the argument that the preliminary examination is of more importance now, is that the statistics cannot be used to support the establishment of a federal constitutional right of access. The role of the preliminary hearing may be less "pivotal" in other states,[4] and yet petitioner would demand the establishment of a *federal* constitutional right because of a perceived change in the criminal system in *California.* And, if the ratio of trials in California should later swing back to a more

[4]For example, as noted by the California Supreme Court in *Johnson v. Superior Court,* 15 Cal. 3d 248, 262 (1975), "[t]he Alabama preliminary hearing [is] far less 'critical' than its California counterpart, because its sole purpose [is] to determine if there [is] sufficient evidence against the accused to justify bringing the case *before a grand jury.*" (emphasis in original.)

modest difference, should the federal constitutional right of access be disestablished?

Moreover, the theory that a constitutional right of access can be premised on a determination of whether the criminal proceeding is a "pivotal" stage would compel an extension of the right of access to all pretrial proceedings as soon as sufficient data could be collected to prove that the proceeding played a significant role in the criminal justice system. Under petitioner's argument, the public would be able to demand unlimited access to the office of the district attorney because it is there that the fundamental decisions to prosecute or not to prosecute are made. While petitioner may argue that it is only seeking access to court proceedings, the basis of the argument is that openness fosters confidence in the criminal justice system. Yet many more decisions as to whether a person should or should not be charged with a crime are made in secret in the office of the district attorney than are made as the result of closed preliminary hearings.[5]

Finally, there is little probability that under California's mandatory policy of openness that the few closures which may occur will destroy public confidence in the system. The California Legistature has expressly provided that openness is the rule except where an accused's Sixth Amendment right to a fair trial would be abridged. This Court has held that "no right ranks higher than the right of the accused to a fair trial" and that in certain rare circumstances even the public's First Amendment right of access to trials must bow to this Sixth Amendment right. *Press-Enterprise Co. v. Superior Court*, 464

[5]In fact, 47 percent of all felony complaints filed in California in Fiscal Year 1983-84 were disposed of before the preliminary hearing. (See Amicus Curiae Brief in behalf of the State of California, p. 9, fn. 5.)

U.S. 501, ____ (1984). But in pretrial proceedings, especially in the accusatory phase of criminal prosecution, different societal interests are evoked. This Court has recognized that, at such a stage, the defendant's Sixth Amendment right, personal to him, is superior to the public interest in openness of proceedings. *Gannett Co. v. DePasquale*, 443 U.S. 368, 384, 390 (1979) [public may be precluded from attending pretrial suppression hearing]; *United States v. Capra*, 501 F.2d 267, 279 (2d Cir. 1974) [public is precluded from attending pre-arrest law enforcement briefings]. In accordance with this recognition, California has placed only the accused's constitutionally guaranteed right of a fair trial above the public's statutorily recognized interest in access to preliminary examinations.

To open up all phases of the criminal process to a constitutional right of access could ultimately lead to unwarranted and disruptive intrusions into all phases of the accusatory process.

IV

In Closing The Preliminary Hearing And Sealing The Transcript, The Magistrate And the Respondent Court, Respectively, Acted In A Manner Consistent With The Defendant's Sixth Amendment Constitutional Right And The Public Interest.

At the commencement of the preliminary hearing, when the accused moved for an exclusionary order, no objection was made by the prosecutor. The magistrate, relying on *California Penal Code,* Section 868 and *Gannett Co. v. DePasquale, supra*, stated his findings as follows:

> "... I feel that in this particular case and appearances in the Court, there has been national publicity.

As a result of Court appearances, that each Court appearance of the Defendant, media has been present and has been reported in the media and I feel that because of the Preliminary Hearing in which many times the defenses are not presented to show the Defendant's side of the issue, that only one side may get reported in the media." (J.A., p. 22a).

The magistrate then concluded that "the motion should be granted to protect the Defendant's right to a fair trial, and impartial trial." (J.A., p. 23a).

This case involved multiple murder charges carrying a death penalty potential. This Court has held that the "trial court's responsibility to preserve the integrity of the jury and minimize the danger of prejudice is at its peak in death penalty cases." *Beck v. Alabama,* 447 U.S. 625, 637-638 (1980). The findings expressed by the magistrate evidence his concerns regarding the defendant's Sixth Amendment right, and it is submitted, are sufficient to satisfy the "reasonable likelihood of substantial prejudice" standard later articulated by the California Supreme Court in this case. (J.A., p. 16a).

At the conclusion of the preliminary hearing on August 31, 1982, the magistrate permitted Chris Bowman, a reporter for the Press-Enterprise, to enter the courtroom. The defendant then moved that the preliminary hearing transcript be sealed in order to protect his right to a fair trial. This was followed by Mr. Bowman's request that the transcript be released to the public. The prosecutor made no objection to the sealing. The magistrate then concluded:

"I have to go back to the Deganti[6] [sic] case again. I don't remember the exact cite, United States Supreme Court, but it is beyond the statutes of the State of California.

"That case holds that a judge or magistrate, be it a trial or be it a preliminary hearing, has an affirmative duty to insure that a defendant has a fair trial. And even though it may overreach some statute here, I feel that under the Deganti [sic] case which states what my duty is, I have to believe that the only way to protect that right would be to seal the transcript. And I would so order it, based on the citations that Mr. Hewatt has given me and also on the Deganti [sic] case." (J.A., p. 37a).

The magistrate's order sealing the transcript of the preliminary hearing which in the first instance had been closed to protect the defendant's right to a fair trial before an impartial jury, was the only logical step which could be taken at that point in the process, in furtherance of that right. Similarly, in *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), where this Court dealt with the question of an automatic closure provision in criminal sex offense trials, the Court noted that the Massachusetts rule, while providing for closure during the testimony of minor victims nonetheless permitted the press access to the transcripts of such testimony. This court went on to note: "Thus, § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come

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[6]Although no citation was given for the "Deganti" case referred to by the magistrate, it is obvious he was referring to *Gannett Co. v. DePasquale, supra,* having cited *Gannett* in his remarks at the time he ordered the preliminary hearing closed. (J.A., p. 22a).

forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. *Globe Newspaper Co.*, 457 U.S. at 610.

On January 21, 1983, a hearing was conducted before the judge in the respondent court at which time the prosecutor moved to have the preliminary hearing transcript unsealed. Also raised at that hearing was the matter of the prosecutor's memorandum of points and authorities in opposition to a *California Penal Code*, Section 995 dismissal motion. The prosecutor, who had presented this memorandum only a few days earlier, had refrained from making it public in order that the question of its disclosure could first be litigated. The reason for this was that in addition to citations of legal authorities and the prosecutor's arguments, the memorandum was prefaced by more than 30 pages of the summarized testimony of prosecution witnesses who had testified at the preliminary hearing.[7]

The judge continued the matter for further hearing and to maintain the status quo, extended the order sealing the preliminary hearing transcript and the prosecutor's memorandum, noting that absent a "very strong showing on the part of the defense" he would unseal the transcript and the memorandum. (S.A.R., pp. A-32 through A-38).

On February 10, 1983, the hearing to determine the motion of the prosecutor, now joined by petitioner, to have the preliminary hearing transcript unsealed was heard before the judge in the respondent court. Except for the reporter Bowman's appearance at the conclusion of the preliminary hearing on August 31, 1982, the first

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[7]This summary is referred to in the respondent court's record of January 21, 1983, as the "statement of fact" (S.A.R., pp. A-1 through A-31; A-32) and the "synopsis of the facts." (J.A., p. 61a).

formal intervention by petitioner in this case appears to have taken place on February 7, 1983, when petitioner filed an application to join the prosecutor in his effort to release the transcript. (P.B., p. 3).

Following argument by counsel for all parties including petitioner, the judge stated:

> ". . . the Court feels compelled under the authority of Gannett to consider several points. First of all, that this is pretrial proceedings, and it's not trial. That whether it is inflammatory type of publicity or merely repetitive factual comments, it has an effect upon the community mind which affects the community pool from which the furors are selected.
>
> "The Court has no objection to the public's right to know. And I think Mr. Mager's initial observations, that as to the evidence he produced it was as factual as it could be . . . It's not extremely inflammatory or exciting type of facts in this.
>
> "But I find it quite easy under Gannett to see that there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial. And I will order that the transcript remain sealed.
>
> "I believe all concerned here — This Court certainly is aware that the defendant has interjected a new concept of a defendant's right, at least as far as I know, and yet it's not a new one. We all know that a defendant has a right to be tried in the jurisdiction in which the act occurred. And as an arraigning magistrate I've had to inform defendants of that right many, many times. He's just carrying that to the ultimate now. He has a right to be tried in this jurisdiction. And so far at this point he's saying,

'there being no more publicity from this point than there is, as things now stand, I think I can stay here. And please, judge, don't do something that will impact upon my trial, so that I can't have a fair and impartial trial here, so that I have to go somewhere else. Because if you send me somewhere else, I've been told it's going to be about an 18-month's trial, I've got umpteen witnesses that I'll have to have there, I am in custody because this is a special circumstances case, I do not have a right to bail, and my loved ones would have to come to me, and there's so much publicity in the south here that, pray tell, where would you send me except hundreds of miles away?'

"It is quite easy for me to find that there is a reasonable likelihood that making all or any part of the transcripts public might prejudice the defendant's right to a fair and impartial trial. The decisions, authorities, supplied by defense counsel also give me implicit authority, and thereunder I do exercise inherent authority to prevent the same mischief." (J.A., pp. 60a, 61a).

Thus, the judge ordered the transcript and the prosecutor's memorandum to remain sealed, balancing the public's interest and the defendant's Sixth Amendment right. In so doing, he articulated the problems a change of venue, necessitated by pretrial publicity, probably would occasion in this case.

This Court has indicated that certain curative measures may be invoked to mitigate the effects of pretrial publicity. (See *Sheppard v. Maxwell,* 384 U.S. 333 (1966).) It is reasonable to assume that trial judges are familiar with them. In this case, the judge appears to have carefully considered the alternative of change of venue. Based upon

his statements, he found it inadequate in terms of the defendant's Sixth Amendment right and the severe hardship it would impose over the course of what was then predicted to be an 18-month long trial, where, as the magistrate had indicated at the time he closed the preliminary hearing, there had been "*national* publicity." (J.A., p. 22; emphasis added).

In this case, the danger of pretrial publicity was particularly acute based upon the nature and multiplicity of the crimes alleged, the fact that it had received nationwide publicity and the further fact that virtually anything even remotely connected with the defendant, but not necessarily relevant to the charges against him, seems to have been reported at least in the locality. (P.B., p. 4: "the marriage of the lead defense counsel to his investigator . . . an unusual altercation in the courtroom between two defense counsel . . ."; also see J.A., p. 51a: defense counsel's reference to "articles indicating that Mr. Diaz's wife was briefly held on a traffic warrant."). Thus, the maintenance of the sealing order was, at the time it was made, patently justifiable.

On September 30, 1983, in an uncommon move for a defendant charged with a capital offense, the defendant in this case waived his right to a jury trial. The waiver was conditioned upon the case being tried before the particular judge of the respondent court who had heard all of the pretrial matters in the respondent court which are detailed hereinabove. (S.A.R., p. A-39). What is most significant with respect to this waiver is the conduct of the judge regarding the sealed preliminary hearing transcript and prosecutor's memorandum. After the judge accepted the waiver, there appears in the record a very brief discussion between the parties and the court involving certain miscellaneous matters, and immediately thereaf-

ter the judge, *sue sponte*, raised the issue of the sealed documents, stating:

> "Now, in regard to particularly orders that this Court has made up to this point sealing certain portions of proceedings in this matter, those motions, those orders were made solely upon the premise of a jury trial. It seems those orders should be vacated." (S.A.R., pp. A-39 through A-43; pp. A-44, A-45).

Because of defense objection to the unsealing of the papers at that time, the matter was continued to October 5, 1983, for a hearing to show cause why the sealing order should not be vacated. (S.A.R., pp. A-45 through A-47). On October 5, 1983, that matter was heard. The defendant continued to oppose unsealing the documents, based upon certain contingencies which might occur and which might cause him to retract his jury waiver or to otherwise reinstate a jury trial. The prosecutor indicated his position favoring the maintenance of the status quo, at least for the (then) three-week period until trial would begin. (S.A.R., pp. A-48 through A-51). Before taking the matter under submission and indicating he would issue his ruling on October 14, 1983, the judge commented:

> "Both attorneys' observations in regard to a possibility of something occurring that might at some point produce a change, is correct. We don't have to look through a whole list of horribles. There are many ways in which it happens that cases just don't proceed smoothly on the line outlined. So I'm not discounting that.
>
> "But I have a deep concern that at this point what you're talking about has to be balanced against the fact that there is a jury waiver and that there is no basis for my order other than the fact that it was a jury trial. I didn't make my order on the possibility. I made my order upon the facts that existed, that there was a jury trial.
>
> "Now, there isn't a jury trial. There may be one, but there isn't one now. And I am concerned that there's any jurisdiction, even any discretion left for me." (S.A.R. p. A-51).

As further evidence of his concern for openness and the public interest, on October 14, 1983, the judge ordered the documents unsealed. (S.A.R., p. A-56).

As this Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966): "... the cure lies in those remedies that will prevent prejudice at its inception." Here, the prevention occurred via the closure of the preliminary hearing, the sealing of its transcript and the maintenance of that sealing until the time that the reason for those actions no longer existed. Importantly, none of those actions impaired the defendant's Sixth Amendment right to a fair trial nor the public's First Amendment right to a public trial.

CONCLUSION

The duties of magistrates and judges in criminal cases involving serious crimes with concomitantly serious potential penalties, cases which engender abundant and widespread publicity, are at best delicate yet crucial affairs. State legislatures should be, and generally are, responsive to regional concerns in enacting rules of criminal procedure which are designed to protect competing rights and interests. This is particularly true in California, as evidenced by the amendment of *California Penal Code*, Section 868 in 1982, to recognize and protect the public interest in openness of preliminary hearings. The

Section, as amended, bears the endorsement of the highest court of the state, as creating a statutory right of access to preliminary hearings.

However, petitioner argues for something more. In so doing, petitioner seeks to place preliminary hearings on the same constitutional plain as criminal trials. This position is inconsistent with the Sixth Amendment rights of persons in the accusatory phase of criminal prosecutions. If accepted by this Court it may place those rights in severe jeopardy insofar as the adjudicatory phase of the prosecution is concerned. Moreover, the implication of a constitutional right of access in the accusatory phase opens the door to disruption of very early stages of the prosecutorial process preceding even the preliminary hearing. It raises the spectre of multiple judicial proceedings to determine competing rights even at, for example, the pre-arrest stage. This, respondent believes, takes the First Amendment beyond what the Framers intended. Traditional constitutional norms, and pragmatic concerns for the integrity of the criminal justice system, dictate affirmance of the holding in this case of the Supreme Court of California.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 2, 1986, I served the within Brief of Respondent on the Merits in re: "The Press-Enterprise Company v. Superior Court of the State of California for Riverside County" in the United States Supreme Court, October Term 1985 No. 84-1560 and Supplemental Appendix thereto;

on the Attorneys in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

[See Attached]

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 2, 1986, at Los Angeles, California

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No. 84-1560

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,
vs.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

On Writ of Certiorari to the California Supreme Court

SUPPLEMENTAL APPENDIX OF RESPONDENT

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PETITION FOR CERTIORARI
FILED MARCH 29, 1985
CERTIORARI GRANTED OCTOBER 15, 1985

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

Index to Supplemental Appendix

Points and Authorities in Opposition to Motion Pursuant to Section 995 of the Penal Code.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF RIVERSIDE
NO. CR. 19889
(Hg. 1/21/83 8:30 D-14)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
ROBERT RUBANE DIAZ,
Defendant(s).

Filed: January 18, 1983

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TESTIMONY OF DR. MICHAEL PEAT

Dr. Peat testified that he is the Associate Director for the Center for Human Toxicology. He tested tissue samples from the twelve victims charged in the Information as well as tissue samples from Estel Jones. The test results supplied by Dr. Peat were set forth in People's Exhibit 41.

Exhibit "A" sets forth the various Lidocaine levels found in the corresponding organ tissue samples tested. The Lidocaine levels are depicted as micrograms per

gram in the organ tissue and micrograms per milliliter in the blood and vitreous humor fluid.

Exhibit "A" also sets forth the metabolite level detected in the samples tested. The first value is the actual Lidocaine level and the second value is the metabolite level. According to Dr. Peat the Lidocaine is metabolized in the liver. When the drug is injected into a patient it passes through the heart into the lung and then back into the heart. It is then distributed to all body organs. Specifically the drug is deposited in the liver, kidney, lung, brain, and heart. As Lidocaine is metabolized in the liver, the metabolite is then also distributed to the body organs.

Detection of metabolite in the body organs aided Dr. Peat in determining how soon before death the Lidocaine was administered. If the Lidocaine level far exceeded the metabolite level, it would indicate the dosage was given shortly before death. The longer Lidocaine circulates in the body one would expect the metabolite level to increase.

According to Dr. Peat a therapeutic dosage of Lidocaine would result in a blood level between two and six micrograms per milliliter. This would generally result from an infusion of less than 250 milligrams per hour.

Lidocaine is given in two fashions. First, it may be injected in a syringe or bolus form. This would be a singular injection from a prepackaged form of Lidocaine. The prepackaged syringe is available in 50 milligrams or 100 milligrams. Secondly, it may be given by intravenous infusion. Lidocaine would be mixed with another solution such as Dextrose and water (sugar water) and placed in an intravenous bottle and given as a drip or slow infusion

into a patient. The infusion rate would generally be one to four milligrams per minute.

Dr. Peat testified that an injection of 1000 milligrams of Lidocaine would be a lethal dosage. He would expect such a dosage to result in tissue concentrations of Lidocaine between 20 to 55 micrograms of Lidocaine per gram of tissue.

Toxic blood levels of Lidocaine would be between eight to ten micrograms per milliliter. Blood concentrations above 20 micrograms per milliliter would be fatal to a patient. Dr. Peat testified that the tissue samples tested on all 12 victims would be consistent with the lethal administration of Lidocaine in the range of more than 1000 milligrams of Lidocaine.

Based upon the low metabolites found in the tissue samples tested, Dr. Peat testified that in his opinion massive dosages of Lidocaine were given to the patients shortly before death. In most cases this would be several hours prior to death. In the case of Virginia Bayless, a massive dose was given within minutes of death. In the case of Clifford Swanson, Dr. Peat testified that a massive dose was given sometime after 5:45 a.m. on the morning of his death.

TESTIMONY OF DR. F. RENE MODGLIN

Dr. Modglin performed autopsies on all victims charged in the Information except for J. Clifford Swanson. With respect to that victim, Dr. McCammon actually performed the autopsy and Dr. Modglin physically examined the body after the autopsy. Dr. Modglin's conclusions regarding cause of death on the patients were based upon his observations and findings during the autopsy, on medical summaries prepared by Doctors Jutzy and Isaeff

on the patients, and toxicology test results performed in large part by the Center for Human Toxicology. Dr. Modglin's laboratory performed blood testing on patient Bertha Boyce, Virginia Bayless and J. Clifford Swanson.

Dr. Modglin testified that in some cases death was caused directly from Lidocaine poisoning, in other cases Lidocaine contributed to the death of the patients in conjunction with other medical problems the patients were experiencing. In all cases Lidocaine shortened the life of the patients.

TESTIMONY OF DR. DALE M. ISAEFF

Dr. Isaeff testified that he is board certified in cardiology and internal medicine. Presently Dr. Isaeff is Director of the Coronary Care Unit at Loma Linda Medical Center.

Lidocaine is a very common drug used as an anti-arrhythmic medication. The drug suppresses and prevents rhythm disturbances arising from the ventricle (lower part) of the heart. The ventricular portion of the heart is the lower main pumping chambers. Lidocaine is a standard stock item in the Intensive Care Unit and is available on open shelves. Lidocaine comes in prepackaged syringes in amounts of 50 milligrams or 100 milligrams. Lidocaine is also available in a two gram (2000 milligram) vial which is especially designed for use in an I.V. bottle. The concentrated Lidocaine is mixed with a solution in the I.V. bottle and is slowly infused into a patient. In most instances the infusion rate is between one to four milligrams per minute.

Dr. Isaeff testified that an electrocardiogram (EKG) monitors the heartbeat and provides a written strip. The

strip contains a heartbeat cycle which is referred to as the QRS complex.

In cases where a patient is receiving too much Lidocaine the first symptoms of Lidocaine toxicity would be a change in behavior, nausea, dizziness, blurred vision, vomiting, and disorientation. These are mild toxic symptoms. Dr. Isaeff would expect, in most patients, mild symptoms to begin to occur in blood levels greater than five micrograms per milliliter. In such cases Lidocaine would be discontinued and the symptoms would clear rapidly. Lidocaine has a one to one and one-half hour half-life. This means that 50% of the Lidocaine would be dissipated in one half-life.

More severe symptoms would be respiratory depression, respiratory arrest, and subsequently followed by seizure activity. Dr. Isaeff would expect severe symptoms to manifest themselves in blood levels greater than ten micrograms per milliliter.

Lastly, in extremely high concentrations, a patient would show a marked widening or broadening of the QRS complex depicted on the EKG.

Massive dosages of Lidocaine interfere with the flow of the electricity from the top part of the heart to the bottom part of the heart. This of course causes a slowing down of the electrical conduction of the heart which results in the broadening or the widening of the heart cycle itself which is referred to as the QRS complex.

To cause the widening of the QRS complex from the massive administration of Lidocaine according to Dr. Isaeff, he would expect the dose of Lidocaine, if it is given in a singular amount, to be between 1000 to 2000 milligrams over a very short time period. If the patient is on a Lidocaine infusion maintaining a theraputic blood level of

between two and six micrograms per milliliter, Dr. Isaeff would expect that a widening or broadening of the QRS complex would result from a singular injection of 1000 milligrams of Lidocaine on top of or in addition to the theraputic infusion. He would expect Lidocaine in a massive dose to cause seizure activity in most cases. Seizures would commence within one to two minutes after injection.

The standing order or protocol at the Community Hospital of the Valleys at Perris called for the administration of a singular bolus of Lidocaine in the amount of 75 milligrams followed by a two milligram per minute infusion. According to Dr. Isaeff the standing orders were within acceptable theraputic standards in the medical profession.

Dr. Isaeff reviewed the medical chart on victim Irene Graham. Graham was admitted to the Community Hospital of the Valleys on March 29, 1981 at 3:15 p.m. The patient died on March 30, 1981 at 6:15 a.m. According to the medical chart Lidocaine was administered to the patient within a theraputic range. Prior to death the QRS complex was extremely broad. Seizure activity was noted. According to Dr. Isaeff the clinical picture of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams.

Dr. Isaeff reviewed the medical chart of victim Bernard Kean. Kean was admitted to the Community Hospital of the Valleys on April 14, 1981 at 1:00 a.m. and expired at 5:07 a.m. on the same day. Seizure activity was noted prior to death with a wide QRS complex. Dr. Isaeff stated that the clinical picture of this client is consistent with the massive administration of Lidocaine within 1000 to 2000 milligrams. The medical chart reflects that Lidocaine was given to this patient within theraputic dosages.

Dr. Isaeff reviewed the medical chart of victim Beatrice Cline. The patient was admitted to the Community Hospital of the Valleys on April 4, 1981 at 4:30 p.m. She expired on April 5, 1981 at 2:30 a.m. Prior to death seizure activity was noted with wide QRS complexes. The chart reflects Lidocaine was given in theraputic dosages. According to Dr. Isaeff the clinical picture of the patient is consistent with the administration of a massive dose of Lidocaine within 1000 to 2000 milligrams.

Dr. Isaeff reviewed the medical chart of victim John Rainwater. John Rainwater was admitted to the Community Hospital of the Valleys on April 9, 1981 at 10:00 p.m. The patient expired on April 11, 1981 at 4:45 a.m. The medical chart reflects wide, broad QRS complexes prior to death. The chart indicates that Lidocaine was given in a theraputic amount. According to Dr. Isaeff the clinical picture of the patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams.

Dr. Isaeff reviewed the medical chart of victim Marion Stewart. The patient was admitted to the Community Hospital of the Valleys on April 10, 1981 at 1:15 p.m. The patient expired on April 14, 1981 at 6:15 a.m. Prior to death broad, wide QRS complexes were noted. According to Dr. Isaeff the clinical picture of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams.

Dr. Isaeff reviewed the medical chart of victim Kenneth Silvera. The patient was admitted to the Community Hospital of the Valleys on April 13, 1981 at 7:55 p.m. The patient expired on April 14, 1981 at 7:32 a.m. Prior to death wide, broad QRS complexes were noted. The medical chart reflects that Lidocaine was administered within theraputic dosages. Accord to Dr. Isaeff the clinical

picture of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams.

Dr. Isaeff reviewed the medical chart of victim Bertha Boyce. The patient was admitted to the Community Hospital of the Valleys on April 20, 1981 at 2:29 p.m. The patient expired on April 22, 1981 at 7:05 a.m. The medical chart reflects that the patient experienced seizure activity and wide, broad QRS complexes prior to death. The medical chart reflects that Lidocaine was administered in theraputic dosages. According to Dr. Isaeff the clinical picture of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams.

Dr. Isaeff reviewed the medical chart of Estel Jones. Patient Jones was admitted to the Chino Community Hospital on March 22, 1981 at 10:50 a.m. The patient expired on March 25, 1981 at 3:50 a.m. Prior to death the patient experienced seizure activity and wide, broad QRS complexes. According to Dr. Isaeff the clinical picture of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams.

TESTIMONY OF ROY JUTZY

Dr. Jutzy is the Chief of Cardiology at the Loma Linda Medical Center. Dr. Jutzy is board certified in cardiology and internal medicine. According to Dr. Jutzy in Lidocaine blood levels in excess of 20 micrograms per milliliter he would expect a widening of the QRS complex. According to Dr. Jutzy this would occur if a patient was administered a massive, lethal dose in the range of 1000 to 2000 milligrams given in a very short time period. Dr. Jutzy has not personally seen Lidocaine blood levels in patients to exceed 10 micrograms per milliliter, which

were very unusual cases. He further stated that occasionally they see levels ranging between 7 and 8 on patients who are receiving large, theraputic amounts of Lidocaine. At Loma Linda Medical Center all patients who are receiving Lidocaine are given daily blood tests to determine Lidocaine levels. Dr. Isaeff's and Dr. Jutzy's opinions were based upon treating hundreds of patients at Loma Linda Medical Center and monitoring their blood levels. Dr. Jutzy has been utilizing Lidocaine as a medication to heart patients for well over the last 20 years.

Lidocaine is the most common drug used in an intensive care or cardiac care unit. Nurses are expected and taught in nursing school about Lidocaine administration and its effects.

Dr. Jutzy reviewed the medical chart on victim Minnie Dempsey. The patient was admitted to the Community Hospital of the Valleys on April 6, 1981 at 3:30 a.m. The patient expired on the same day at 7:20 a.m. Prior to death the patient experienced seizure activity and a wide, broad QRS complex. According to Dr. Jutzy the clinical picture of this patient would be consistent with the administration of a massive dose of Lidocaine in the range of 1000 to 2000 milligrams. Furthermore, Dr. Jutzy stated that the administration of the Lidocaine in his opinion was given at 4:39 a.m. to give the kind of clinical picture he subsequently saw. The amount of Lidocaine administered to the patient per the medical chart was within the acceptable theraputic range.

Dr. Jutzy reviewed the medical chart of victim Gertrude Bryant. The patient was admitted to the Community Hospital of the Valleys on April 7, 1981 at 1:19 p.m. The patient expired on April 8, 1981 at 7:33 a.m. Prior to death the patient experienced seizure activity and a wide QRS complex. According to Dr. Jutzy the clinical picture

of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams. Furthermore, Dr. Jutzy stated that the massive dose of Lidocaine was given around 5:30 a.m.

Dr. Jutzy reviewed the medical chart on victim Henry Castro. The patient was admitted to the Community Hospital of the Valleys on April 17, 1981 at 6:00 p.m. The patient expired on April 20, 1981 at 4:58 a.m. Prior to death the patient experienced seizure activity and a wide, broad QRS complex. According to Dr. Jutzy the clinical picture of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams.

Dr. Jutzy reviewed the medical chart of victim Virginia Bayless. The patient was admitted to the Community Hospital of the Valleys on April 19, 1981 at approximately 10:00 p.m. The patient expired on April 20, 1981 at 1:38 a.m. Prior to death the patient experienced a wide QRS complex. According to Dr. Jutzy the clinical picture of this patient is consistent with the massive administration of Lidocaine in the range of 1000 to 2000 milligrams. A hypothetical question was posed to Dr. Jutzy, to wit, assuming that the blood level of Lidocaine on this patient was 130 microgram per milliliters, how much Lidocaine would have to be administered to this patient to achieve such a blood level? According to Dr. Jutzy, the patient would have to receive 2000 to 3000 milligrams of Lidocaine or more to achieve such a high blood level. The medical chart reflects that no Lidocaine was administered to this patient.

Dr. Jutzy reviewed the medical chart on victim J. Clifford Swanson. The patient was admitted to the San Gorgonio Pass Hospital on April 21, 1981 at 10:45 p.m. The patient expired on April 25, 1981 at 7:00 a.m. The

patient experienced seizure activity and a broad QRS complex. According to Dr. Jutzy the clinical picture is consistent with the administration of 1000 to 2000 milligrams of Lidocaine. The medical chart reflects that a theraputic amount of Lidocaine was aministered to this patient.

Victims Irene Graham, Bernard Kean, Beatrice Cline, Minnie Dempsey, Gertrude Bryant, John Rainwater, Kenneth Silvera, Marion Steward, Virginia Bayless, Henry Castro, and Bertha Boyce all died while patients in the Intensive Care Unit at the Community Hospital of the Valleys. J. Clifford Swanson was a patient in the Intensive Care Unit at the San Gorgonio Pass Hospital. Estel Jones was a patient in the Intensive Care Unit at Chino Community Hospital.

TESTIMONY OF DR. IRVING ROOT

Dr. Root testified that he performed an autopsy on Estel Jones on May 18, 1981. His opinion concerning cause of death was based upon his findings during the autopsy and toxicology test results received from the Center for Human Toxicology. Cause of death was the result of Lidocaine toxicity with a contributing cause being coronary arteriosclerosis with myocardial infarctions. According to Dr. Root, Lidocaine did shorten the life of Mr. Jones. Based upon Dr. Root's findings it is his estimate that patient Jones must have received a minimum of 2000 and probably closer to 3000 milligrams of Lidocaine prior to death. This amount of Lidocaine was administered within two hours of the patient's demise. Dr. Root stated that the level of Lidocaine found in the lung would be best representative of the blood level of Lidocaine.

The Lidocaine administered to patient Jones was by way of massive injection and not by way of a continuous intravenous infusion. If Lidocaine is being infused into the body, one would expect to find the ratio of the parent compound Lidocaine unchanged to the metabolite of Lidocaine in a ratio of approximately 3 to 1. In other words the Lidocaine detected in the tissues should be approximately three times as high as the metabolite. This would be expected in cases where the Lidocaine is administered by way of an intravenous infusion. In the case of Mr. Jones the ratio between the Lidocaine detected in the metabolite is approximately 100 to 1 in all organs tested.

The patient had been on a continuous intravenous infusion of Lidocaine up until approximately 17 hours prior to death. According to Dr. Root the patient would have cleared all of the Lidocaine infused into the body during that period of time and none would have been detectible at the time of death. Pursuant to the medical chart on the patient, within several hours of death on the 25th of March, he received only 200 milligrams of Lidocaine.

TESTIMONY OF DOROTHETTA ERNEST

Mrs. Ernest testified that she is a Registered Nurse and was employed through a nursing registry in 1981. On March 29, 1981, the witness was assigned to work at the Community Hospital of the Valleys in the Intensive Care Unit. Her shift began at 11:00 p.m. on March 29, 1981 and concluded at 7:00 a.m. on March 30, 1981. Registered Nurse Robert Diaz and Licensed Vocational Nurse Donna MacDonald worked with Mrs. Ernest on that shift in the Intensive Care Unit.

The witness described the Intensive Care Unit at the Community Hospital of the Valleys as a separate unit of

the hospital containing six beds. Entry into the Intensive Care Unit was by way of a double door which separated the unit from the rest of the hospital. People's Exhibit 53 was identified as the floor plan of the Intensive Care Unit.

Mrs. Ernest was assigned to patient Irene Graham. Mrs. Graham was one of the patients in the Intensive Care Unit on that particular shift. Mrs. Ernest first made a nursing assessment on patient Graham. This included a check of the patient's respirations and the patient's intravenous site. The witness did not recall anything out of the ordinary or unusual about the patient. The patient was on an intravenous infusion of D5W. D5W is essentially dextrose in water or sugar water.

The witness took a break at about 4:30 or 5:00 in the morning of the shift. At that time Mrs. Graham was sleeping soundly. The witness went to the break room which is right behind the nurses desk within the Intensive Care Unit. At that time Robert Diaz and Donna MacDonald were the only medical personnel in the Intensive Care Unit. While on her break, L.V.N. MacDonald came into the break room and told Ernest that she better come out now, that her patient is coding. Mrs. Ernest left the break room and as she approached the desk area of the Intesive Care Unit she observed Robert Diaz in her patient's room. He was injecting something into Mrs. Graham's I.V. line. Diaz told Mrs. Ernest that he was injecting a bolus of Lidocaine into the patient. Mr. Diaz stated that that was the second bolus he had given her. Mrs. Ernest then mixed a Lidocaine drip and it was hung at a rate of 2 milligrams per minute pursuant to the standard orders at the hospital for a Lidocaine drip. The witness administered no other Lidocaine to the patient.

After starting the Lidocaine infusion on the patient, she returned to the nursing desk to chart on the patient.

After approximately 15 minutes she heard the patient screaming out in the room. The patient then started having a seizure. When the patient began to scream and seizure she does not recall whether or not Robert Diaz was in the patient's room. A code was called on the patient and other medical personnel from the rest of the hospital responded. The patient expired at 6:15 a.m.

TESTIMONY OF DONNA MAC DONALD

The witness is a Licensed Vocational Nurse and in March of 1981 was working through a nursing registry. She was assigned to work the 11 to 7 shift on March 29 to March 30, 1981 at the Community Hospital of the Valleys. She worked in the Intensive Care Unit with nurse Robert Diaz and nurse Dorothetta Ernest. Mrs. MacDonald stated that she did not administer any Lidocaine to patient Graham. Furthermore, the administration of Lidocaine is not within the licensing standards of a L.V.N. While Mrs. Ernest was on her break. Mr. Diaz informed Mrs. MacDonald that patient Graham was having problems. Mrs. MacDonald went to the break room to get Mrs. Ernest. Mrs. Ernest responded to her patient and for a period of time the patient settled down. After the patient stabilized Mrs. Ernest was working at the nursing desk doing paperwork. Patient Graham then began seizuring and screaming. When this occurred she does not now recall where Mr. Diaz was physically situated within the unit.

Mrs. MacDonald worked the 11 to 7 shift at the Community Hospital of the Valleys beginning on April 4, 1981 and ending at 7 a.m. on April 5, 1981. She worked in the Intensive Care Unit on that shift with Robert Diaz and no other medical personnel. She recalls patient Beatrice Cline during the shift was brought in from the Emergency

Room at approximately 12:00 midnight. She was in the unit approximately an hour and became agitated and then appeared to start seizuring. Before the patient began to seizure, Robert Diaz was in and out of the room. When the patient began to seizure, a code was called and other medical personnel from the rest of the hospital came into the unit to assist. Patient Cline expired at approximately 2:30 a.m. Mrs. MacDonald did not administer any Lidocaine to patient Cline. The seizure activity she observed in patient Graham and patient Cline was identical.

Mrs. MacDonald also worked the 11 to 7 shift at the Community Hospital of the Valleys commencing on April 19 and concluding at 7:00 a.m. on April 20, 1981. She was assigned to the Intensive Care Unit and worked that particular shift with Robert Diaz and L.V.N. Susie Stroman. She recalls that patient Henry Castro began to seizure towards the middle of the shift. Immediately before the seizure activity she cannot recall where Mr. Diaz was located within the unit. While Mr. Castro was seizuring, Mrs. MacDonald and Ms. Stroman were in the room attempting cardiac pulmonary resuscitation. Mr. Diaz at that particular point in time was not in the room. Patient Virginia Bayless had a cardiac arrest in another room in the Intensive Care Unit. Two codes were simultaneously called. Ms. Stoman left Mr. Castro's room and Mr. Diaz came back in. Ms. Stoman went to attend patient Bayless. While in the room alone with Mr. Diaz, she was handed a syringe and was asked to administer it through the intravenous line. She was instructed to push or adminster half of the syringe. She told Diaz that her license did not allow her to give intravenous injections. He told her to do it anyway. She placed her thumb on the end of the syringe and injected half of the medication into the bed linen and then placed the syringe on a shelf in the patient's room. This was room 20. After the codes were

called on the patients, additional medical personnel responded to assist. Mrs. Bayless expired at approximately 1:38 in the morning. Mr. Castro stabilized and subsequent to the first code was coded several times later. He seizured on and off during the course of the evening until his expiration at approximately 4:58 a.m. Mr. Diaz was in and out of Mr. Castro's room up until the point in time that he expired. Mrs. MacDonald did not administer any Lidocaine to patient Castro or patient Bayless.

TESTIMONY OF SUSAN STROMAN

Ms. Stroman is a Licensed Vocational Nurse. She worked through a nursing registry and on April 19, 1981 was assigned to work the 11 to 7 shift at the Community Hospital of the Valleys. The shift began on April 19 at 11:00 p.m. and ended on the 20th of April at 7:00 a.m. She was initially assigned to work the medical/surgical floor. However, later on in the shift was reassigned to work in the Intensive Care Unit. She worked the shift in the Intensive Care Unit with Robert Diaz and Donna MacDonald. She recalled doing a nursing assessment on patient Bayless. After finishing the assessment with Mrs. Bayless, she walked out of the room and Mr. Diaz was coming out of Mr. Castro's room and said to her, "Come and look at this man. He looks strange." She went into Mr. Castro's room and he immediately went into a grand mal seizure. At this time Mrs. MacDonald was behind the nursing desk at the EKG monitor. Mr. Castro then went into respiratory failure and a code was called. While Mr. Diaz was in and out of Mr. Castro's room, patient Bayless developed cardiac arrest and a code was then called on her. When Mr. Castro seizured the only medical personnel in the unit was Mr. Diaz, Mrs. MacDonald and Ms. Stroman. She testified she did not administer any Lido-

caine to Mr. Castro or Mrs. Bayless. Robert Diaz was the Supervising Registered Nurse in the Intensive Care Unit that night.

TESTIMONY OF LOIS CHEVILLE

Mrs. Cheville is a Registered Nurse and has been since 1945. The witness was a staff nurse assigned to the Intensive Care Unit at the Community Hospital of the Valleys. On April 3, 1981, the witness worked the 11 to 7 shift commencing at 11:00 p.m. on the 3rd and ending at 7:00 p.m. on the 4th of April 1981. She worked that shift alone in the unit with Robert Diaz. Bernard Kean was her patient.

She admitted him into the unit at approximately 1:00 a.m. in the morning and assessed his physical condition. The patient was receiving an intravenous flow of D5W. The patient began to seizure at approximately 2:10 a.m. and the seizure lasted approximately 30 seconds then followed by two more seizures. Up until this point in time no Lidocaine had been administered to Mr. Kean according to Mrs. Cheville. When the patient began to seizure Mrs. Cheville was behind a nursing desk doing some book work. Mr. Diaz and Mrs. Cheville were the only medical personnel in the unit. She cannot recall exactly where Mr. Diaz was inside the Intensive Care Unit immediately before the seizure activity. At approximately 2:30, a Lidocaine bolus was given followed by a Lidocaine drip. This was administered because of the ventricular tachycardia the patient was experiencing. The patient then stabilized and at 3:30 the patient was sleeping quietly with vital signs that were good. While Mrs. Cheville and Diaz were alone in the Intensive Care Unit, at approximately 4:00 a.m. the patient had another seizure lasting about a minute. During the period of time between 3:30 and 4:00

a.m., Mrs. Cheville does not have a recollection as to whether or not Mr. Diaz was in the room of patient Kean. Mrs. Cheville testified that the Lidocaine is kept in medical supply cabinets behind a nursing desk. The supply cabinets are unlocked and there is no sign-in sheet to be filled out when Lidocaine is taken. Lidocaine is kept in the cabinets in bolus and vial form. In bolus form it's stocked in 50 and 100 milligram syringes. In vial form it is stocked at the hospital in one and two gram vials. The vials are to be used for Lidocaine infusions or drips.

Mr. Diaz was dressed in a white uniform with white trousers, a white shirt and a white jacket with pockets. She observed Mr. Diaz to carry a bolus of Lidocaine in his shirt pocket each shift that she worked with him. When Mrs. Cheville worked with Mr. Diaz, she would observe him carry a bag into the Intensive Care Unit and leave it in the nurse's lounge.

Mrs. Cheville worked the 11 to 7 shift on April 7 and April 8, 1981. She worked with Robert Diaz in the Intensive Care Unit. She was assigned to patient Gertrude Bryant. She first assessed the physical condition of the patient and took vital signs. The patient was receiving Nipride by way of intravenous infusion to stablize blood pressure. She appeared to be in a stable state. The patient began to seizure at approximately 5:15 a.m. At that point in time Mrs. Cheville had administered no Lidocaine to the patient. To her knowledge, no Lidocaine had been administered. She was behind the nusing desking doing book work when the patient seizured. Mr. Diaz was behind the desk watching the monitor, however, she does not recall how long he was at that location prior to the seizure activity.

The patient was then given Valium and was oxigenated with an ambu bag. The patient was then intubated. Mr.

Diaz then administered a Lidocaine bolus and a Lidocaine infusion was started at two milligrams per minute. The terminal code was called at 7:26 a.m.

Mrs. Cheville was assigned to the Intensive Care Unit on April 10 and 11, 1981 and worked the 11 to 7 shift. She worked that shift in the Intensive Care Unit with Robert Diaz and Sarla Duller. John W. Rainwater was a patient in the unit on that shift. During the shift Mrs. Cheville recalls Mr. Rainwater seizuring and a code was called and the patient expired. She did not administer any Lidocaine to the patient. At the time of the seizure activity, Mr. Diaz, Mrs. Duller, and Mrs. Cheville were the only nurses inside the unit. When the code was called other medical personnel from the hospital responded. Just prior to the seizure activity on Mr. Rainwater, Mr. Diaz was checking the patient.

Mrs. Cheville was assigned to the Intensive Care Unit on April 13 and 14, 1981 and worked the 11 to 7 shift. She worked that shift with Mr. Diaz and L.V.N. Carl Chetlan.

Mr. Chetlan was the attending nurse for patient Kenneth Silvera. She recalls Mr. Silvera seizuring and two codes were called on him and he finally expired. She did not administer any Lidocaine to Mr. Silvera. Prior to the seizure activity on Mr. Silvera, Mr. Diaz had been in the room frequently helping Mr. Chetlan.

The only medication that Mrs. Cheville administered to patient Silvera was Lasix at approximately midnight. Mr. Silvera expired at approximately 7:32 a.m.

During the shift another patient by the name of Marion Steward was assigned to Mrs. Cheville. During the shift, Mrs. Cheville recalls that the patient started putting out a very large amount of urine which bothered her. She called Dr. Fandrich and the the doctor responded to the hospi-

tal and ordered lab work done on the patient. Between 4:30 and 5:00 a.m. Mrs. Cheville administered 75 milligrams of Lidocaine to the patient. The patient was showing ventricular tachycardia and after the administration of the Lidocaine, the pattern went back to normal. At 5:55 a.m. the patient went into ventricular fibrillations. At that time Mr. Diaz, Mr. Chetlan, Mrs. Cheville and Dr. Fandrich were alone in the unit. Mrs. Cheville and Dr. Fandrich were behind a nursing desk at the time of the code. She does not recall where Mr. Diaz was located inside the Intensive Care Unit. The patient expired at 6:15 a.m.

TESTIMONY OF CARL CHETLAN

Mr. Chetlan is a Licensed Vocational Nurse and in April of 1981 was working through a nursing registry. He was assigned to work at the Community Hospital of the Valleys Intensive Care Unit on April 5 and 6, 1981. He worked the 11 to 7 shift. He worked that shift alone with Robert Diaz. Patient Minnie Dempsey was admitted into the Intensive Care Unit at approximately 3:00 a.m. on April 6, 1981. At that time Mr. Chetlan did a base line assessment of the patient. She was in the unit approximately one hour and developed seizure activity. At the time of the seizure activity Mr. Chetlan was alone in the unit with Mr. Diaz. Mr. Chetlan did not administer any Lidocaine to the patient. Furthermore, he has never administered Lidocaine to any patient. Mr. Chetlan does not recall physically where Mr. Diaz was situated inside the Intensive Care Unit immediately before the seizure activity. When the code was called on patient Dempsey other medical personnel responded from other parts of the hospital to assist. The patient expired at approximately 7:20 a.m.

Mr. Chetlan was assigned to work the 11 to 7 shift at the Community Hospital of the Valleys on April 7 through April 8, 1981. He worked that shift in the Intensive Care Unit with Robert Diaz, Lois Cheville and Nurse Wingo. He testified he did not administer any Lidocaine to patient Gertrude Bryant.

Mr. Chetlan was assigned to work at the Community Hospital of the Valleys' Intensive Care Unit on April 13 through April 14, 1981 on the 11 to 7 shift. He worked the shift with Robert Diaz and Lois Cheville, and he was assigned a patient by the name of Kenneth Silvera. Mr. Silvera was already in the unit when Mr. Chetlan arrived. He first did a base line assessment. Robert Diaz administered a 100 milligram bolus of Lidocaine at approximately 12:53 a.m. At 1:15 a.m. Mr. Diaz mixed a Lidocaine drip and started it at one milligram per minute. Mr. Diaz increased the Lidocaine infusion to two milligrams per minute at 1:53. At 2:02 a.m. the patient began to seizure and went into respiratory arrest and a code was called. The Lidocaine was turned off. When the patient began to seizure Mr. Chetlan, Lois Cheville and Mr. Diaz were the only medical personnel in the unit. According to Mr. Chetlan, he was behind a nursing desk at the time. He does not physically recall where Mr. Diaz was when the patient began to seizure.

The patient survived the first code and gradually started coming around. The patient started to seizure again and a second code was called at approximately 7:14 a.m. At the time of the second seizure nurse Joyce Darling was present in the Intensive Care Unit. She was the on-coming nurse to relieve the 11 to 7 shift. Her shift would technically start at 7:00 a.m. to 3:00 p.m. Mr. Chetlan testified that Joyce Darling went into Mr. Silvera's room and restarted the I.V. infusion of Lido-

caine that was initially mixed by Mr. Diaz and turned off by Mr. Chetlan at 2:02 a.m. Aproximately two minutes after starting the Lidocaine infusion the patient began to seizure. The patient died at 7:32 a.m.

During the shift that Mr. Chetlan worked and attended patient Silvera, he recalls patient Marion Steward also being in the unit. Mr. Chetlan testified that he did not administer any Lidocaine to patient Steward.

TESTIMONY OF SANDRA WINGO

Mrs. Wingo testified that she is a Registered Nurse. In April of 1981, Mrs. Wingo was working through a nursing registry. She was assigned to the Community Hospital of the Valleys' Intensive Care Ward on the 11 to 7 shift on April 7 through April 8, 1981. She recalls working that shift with Robert Diaz, a male L.V.N. and a female R.N.

She recalls that the patient Gertrude Bryant being in the unit during that shift and testified that she did not administer any medication whatsoever to the patient.

Mrs. Wingo testified that she was assigned to the Intensive Care Unit at the Community Hospital of the Valleys on the 11 to 7 shift on April 21 through April 22, 1981. During that shift she worked alone with Robert Diaz. During the shift there were two patients in the six-bed Intensive Care Unit. She was assigned to patient Feitner and Robert Diaz was the attending nurse on patient Bertha Boyce. At the beginning of the shift Mr. Diaz told her that they should take their lunch break early because he felt the patients were going to go bad and he then asked her which one she thought would go first. Bertha Boyce was in Room 20. Later on in the shift patient Boyce arrested and seizured and a code was called. At the time of the seizure, Mrs. Wingo was in the

unit with Robert Diaz and Dr. D. Mrs. Wingo did not administer any medication to Bertha Boyce. Mrs. Wingo's patient, Feitner, also seizured during the shift and was coded. The patient however survived.

TESTIMONY OF PRAPHAVADEE DHARMAPANIJ

Dr. Dharmapanij testified that she is a licensed Medical Doctor and was associated with the Community Hospital of the Valleys. She was one of the treating doctors for a patient by the name of Bertha Boyce. In the early morning hours of April 22, 1981, she received a telephone call from Robert Diaz. She was at home and he was calling from the hospital in regards to patient Boyce. He wanted an order to give the patient Lidocaine. Dr. Dharmapanij ordered a 75 milligram bolus of Lidocaine. Diaz was told to call her back and report the patient's condition. Dr. Dharmapanij went back to sleep and woke up sometime later and realized that she had not been called back. She called the hospital and spoke with Robert Diaz concerning the condition of Bertha Boyce. After the conversation she went to the hospital and arrived at approximately 4:00 a.m. After arriving at the hospital she went into patient Boyce's room and examined the patient. She then went to the nursing desk and began reviewing the chart on the patient. After her review she went back into the room and found the patient not breathing. The patient then began to seizure. The patient went into cardiac arrest and a code was called. While she was reviewing the patient's chart at the nursing desk, Dr. Dharmapanij does not know whether Mr. Diaz went inside patient Boyce's room.

During the code on the patient, Dr. Dharmapanij ordered two 75 milligram boluses of Lidocaine. Dr. Dharmapanij is not aware of any other Lidocaine being

administered to the patient. Patient Boyce died at approximately 7:05 a.m. in Room 20.

TESTIMONY OF LYNN RACE

Ms. Race testified that she is a Registered Nurse licensed in the State of California. In April of 1981, she worked through a nursing registry. On April 6, 1981, she was assigned to work the 7 to 3 shift at the Community Hospital of the Valleys. On that day she arrived several minutes before 7:00 a.m. When she arrived Robert Diaz and Carl Chetlan were present in the Intensive Care Unit. At that time she was told by Robert Diaz that Minnie Dempsey was bad and she was going to code. Within a few minutes the patient did in fact code. At the time of the terminal code Robert Diaz was already in the room. When Ms. Race entered the room the patient was having seizures. Ms. Race did not administer any Lidocaine to the patient.

Ms. Race testified that Mr. Diaz was wearing a nurse's uniform with white pants and a smock top. There were two pockets in the front. She saw syringes in the pockets and empty bottles of medicine.

On one occasion she remembered Robert Diaz pulling a vial of medication from his pocket and inserting a syringe and drawing out medication. She testified that the vial of medication was similar in size to People's Exhibit 50, which is a two gram or 2000 milligram vial of Lidocaine used for mixing I.V. infusions. Ms. Race stated that it is not normal procedure for nurses to carry around syringes or medications in their pockets.

Ms. Race worked the 7 to 3 shift on April 8, 1981 at the Community Hospital of the Valleys Intensive Care Unit. When she came on shift that morning Robert Diaz, Carl

Chetlan and Lois Cheville were present in the unit. At that time she had a conversation with Mr. Diaz concerning patient Gertrude Bryant. Diaz told her that she was in trouble and that she was going to code and was going to go. She characterized his demeanor as very excited and very hyper. He paced constantly back and forth from patient Gertrude Bryant's room to the nurses station and was looking at the monitor. Mr. Diaz was in the room just before the code was called. The patient began to seizure and a code was called.

Ms. Race worked the 7 to 3 shift on April 14, 1981 in the Intensive Care Unit at the Community Hospital of the Valleys. When she came on shift that day, Robert Diaz and Carl Chetlan were present from the night shift. Joyce Darling from the day shift was also present. Mr. Diaz appeared to be extremely excited and told Ms. Race that patient Kenneth Silvera was very bad and was going to code. When Robert Diaz made this statement he was standing in front of the patient's doorway in the room. Within a few minutes the patient seizured, a code was called and the patient expired.

She testified that after a patient died in the Intensive Care Unit, the body would be removed and the bed remade for the receipt of another patient. This would normally be done by the nursing personnel within the unit.

TESTIMONY OF ANTOINETTE MILLER

Ms. Miller is a Registered Nurse licensed in the State of California. In April of 1981, she was supervisor of the Intensive Coronary Care Unit at San Gorgonio Pass Hospital. In the early morning hours of April 25, 1981, she received a telephone call from the hospital. She responded to the hospital at that time to assist in patient

care in the Coronary Care Unit. She arrived at approximately 3:30 a.m. Present in the unit at that time was Dr. Azlam, Dave Neuman (a respiratory therapist), nurse Betty Bickmore, L.V.N. Toni Todero, and Robert Diaz. At that time they were trying to resuscitate a patient by the name of Patton. Mr. Patton expired and was pronounced dead at 3:37 a.m. There were two other patients in the unit at that time, J. Clifford Swanson and a patient by the name of Jones. After Mr. Patton expired, the medical personnel assigned to the unit consisted of Robert Diaz, Toni Todero, and Ms. Miller. At approximately 5:15 a.m. on the morning of April the 25th, Ms. Miller administered a 50 milligram bolus injection of Lidocaine to patient Swanson. The bolus was followed by a Lidocaine drip at two milligrams per minute at 5:20 a.m. At approximately 6:15 a.m. Robert Diaz informed Ms. Miller that he was giving the patient another 75 milligrams of Lidocaine. At approximately 6:30 Dorothy Morford arrived in the Coronary Care Unit. Mrs. Morford was assigned to work the 7 to 3 shift in the unit on April 25, 1981. After her arrival, she and Ms. Miller went into the staff lounge which is inside the Coronary Care Unit. They stayed in the lounge approximately 15 minutes and upon walking out of the lounge Ms. Miller observed Robert Diaz to be at Mr. Swanson's bedside next to the intravenous line. He then walked back to the nurses' desk and sat down. He was carrying a 3cc syringe in his hand. Mrs. Todero was behind the nursing station.

Within two or three minutes the patient Swanson began to seizure and a code was called. He then expired.

TESTIMONY OF TONI TODERO

Mrs. Todero testified that she is a Licensed Vocational Nurse. On April 24 and 25, 1981, she was assigned to

work the 11 to 7 shift at the San Gorgonio Pass Hospital. She testified that she worked that shift with Robert Diaz. She testified that she administered no Lidocaine to patient Swanson.

TESTIMONY OF SANIT BUMROONGCHART

The witness testified that he was a Medical Technologist employed at the San Gorgonio Pass Hospital in April of 1981. He took two blood tests from patient J. Clifford Swanson. One blood test was a 3:05 a.m. and the second test was conducted at 5:45 a.m. The blood drawn from the patient was placed in two vials and labled as to time.

TESTIMONY OF NESSA ROSENBAUM

The witness testified that she was a lab technician employed at Bio Laboratories in April of 1981. She tested the blood samples drawn from J. Clifford Swanson labled at 3:05 a.m. and at 5:45 a.m. She tested the blood for a quantitative analysis for the presence and level of Lidocaine. The blood sample drawn at 3:05 contained no Lidocaine. The blood sample drawn at 5:45 contained 1.2 micrograms per milliliter of Lidocaine.

TESTIMONY OF RITA DRIVER

Mrs. Driver testified that she is a Registered Nurse and in March of 1981 was employed through a nursing registry. She was assigned to the Chino Community Hospital to work the 11 to 7 shift on March 24 through March 25, 1981. On that shift she was scheduled to work in the Coronary Care Unit. She testified that she worked that shift in the unit alone with Robert Diaz.

She stated that during the shift there were three patients in the Coronary Care Unit at the hospital. Robert

Diaz was assigned to patient Estel Jones. At the beginning of the shift Mr. Diaz while looking at the monitors in the unit made the statement to Mrs. Driver that they were going to have trouble with Estel Jones. When that statement was made by Mr. Diaz, Mrs. Driver looked at the monitor and observed a sinus rhythum. A sinus rhythum is a regular rhythum. She saw nothing unusual with Mr. Jones medical condition.

Mrs. Driver was assigned to the two remaining patients in the Coronary Care Unit. Shortly before 3:00 a.m. on that shift, Mrs. Driver was at bedside with Mr. Diaz and patient Jones. Mrs. Driver had just mixed a Dopamine drip for the patient. Apparently the patient was having some problems with maintaining blood pressure. Mr. Diaz made the statement to her that the blood pressure was now okay and they weren't going to start the Dopamine drip. At that time Mrs. Driver left to check on the other two patients. She left Mr. Diaz at bedside with patient Jones. She was gone for approximately two to three minutes checking on her own patients. When she returned Mr. Diaz was still bedside with patient Jones. She started to take patient Jones' blood pressure but within a few seconds the patient started seizuring. A code was called and additional medical personnel responded from other parts of the hospital. The patient expired at 3:50 a.m.

TESTIMONY OF ROBERTA DIXON

Mrs. Dixon is an Administrative Secretary at Golden Triangle Hospital in Perris. The hospital was formerly the Community Hospital of the Valleys. The Community Hospital of the Valleys was closed in May of 1981. The physical structure was purchased by Golden Triangle and the hospital was going through physical renovations. On November 24, 1981, the old Intensive Care Unit was being

renovated. The walls were being knocked out and new plumbing was being installed. She testified that on that day a Lidocaine syringe was found tucked under the bed sheets on the bed in Room 20.

After the hospital closed in May of 1981, the structure was secured and in essence remained untouched until renovations were commenced. The Intensive Care Unit remained undisturbed until November 24, 1981. This included the beds in the unit which had been made up for the receipt of patients.

TESTIMONY OF JEAN McCORMICK

Mrs. McCormick was the Hospital Administrator at the Community Hospital of the Valleys. She testified that Exhibit 69 was copies of the Coronary Care register for March and April of 1981. The document sets forth all patients admitted into the Intensive Care Unit along with the date and time. She testified that Exhibit 70 was a work sheet for the Intensive Care Unit setting forth in what rooms individual patients were assigned.

The last patient to be admitted to the Intensive Care Unit was on April 22, 1981. That patient transferred out on April 24, 1981. No further patients were admitted into the unit. The last patient to occupy Room 20 of the Intensive Care Unit was Bertha Boyce who expired on April 22, 1981 at 7:05 a.m.

TESTIMONY OF JOHN THOMAS ABERCROMBIE

Mr. Abercrombie testified that he is a Criminalist employed at the Department of Justice. Mr. Abercrombie was in receipt of the syringe found in Room 20 in the Intensive Care Unit at the Community Hospital of the Valleys. He described the syringe as a bolus of Lidocaine

labled as a 100 milligram 2% dosage, manufactured by Abbott bearing a lot number of 11-614-DK. The bolus when full would contain approximately 5 milliliters of liquid. There was approximately one milliliter of liquid in the bolus upon receipt.

Mr. Abercrombie tested the liquid remaining in the bolus to determine the existence and amount of Lidocaine in the substance. He determined that the liquid actually contained a 23% solution of Lidocaine. When the bolus was full it would have contained approximately 1150 milligrams of Lidocaine.

TESTIMONY OF ANGELO RIENTI

Mr. Rienti testified that he was a fingerprint expert employed by the Department of Justice. He was supplied a latent fingerprint card from Donna MacDonald. Mr. Rienti examined the bolus of Lidocaine recovered from Room 20 in the Intensive Care Unit at the Community Hospital of the Valleys. He detected a latent print on the end of the bolus. He determined that print to be the right thumb print of Donna MacDonald.

TESTIMONY OF DAVID JACOBSEN

Mr. Jacobsen testified that he is a Laboratory Technician for Abbott Laboratories in North Chicago, Illinois. Mr. Jacobsen was requested to analyze a particular lot of Lidocaine, that lot being number 11-614-DK. He found the lot sample to contain 2% Lidocaine with a total dosage of approximately 97.6 milligrams in a vial labled 100 milligrams. The relative standard deviation in the testing procedure is plus or minus 1% of the result. In this particular case the result was 97.6 plus or minus .97 as an error factor.

TESTIMONY OF DAVID WILLIAMSON

Mr. Williamson testified that he is the manager of Methods Development Services at Abbott Laboratories. He reviews all the manufacturing directions at Abbott with respect to drug development. His group developed the methodology for Lidocaine testing known as HPLC, High Pressure Liquid Chromotography. He generally oversees and approves manufacturing techniques for Lidocaine at Abbott. He testified that when Lidocaine is prepared it is made in lots or large batches of liquid. Each lot is one mixture or a homogeneous solution. From one particular lot numerous boluses of Lidocaine are bottled and distributed. Each bolus from a particular lot will be labled with the lot number. Samples of the Lidocaine boluses are retained at Abbott for future testing. The boluses are selected at random from the lot.

Mr. Williamson testified that if the sample of Lidocaine retained by Abbott was consistent with the dosage labled on the bolus, it would be representative of the entire drug the came from the particular lot.

TESTIMONY OF DIANE DONALIES

The defendant Robert Diaz in March of 1981 applied to work for the Staff Builders Health Care Nursing Registry in San Bernardino as a Registered Nurse. Mr. Diaz submitted an application with supporting certificates. The documents substantiate that Mr. Diaz is a Registered Nurse with special training in the field of coronary care and intensive care with an extensive employment history in hospitals.

Reporter's Partial Transcript of Proceedings of January 21, 1983.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
ROBERT RUBANE DIAZ,
Defendant.
No. CR-19889.
Before Hon. John H. Barnard, Judge, Dept. 14.

MR. MAGERS: And, additionally, Your Honor, I would like to be heard on an additional matter.

I filed my points and authorities, as I said, this Tuesday. And I requested that the matter be filed with this Court and the issue of disclosure be in essence litigated at this hearing.

I did not make public my points and authorities or statement of fact at that time because the People wanted to maintain the status quo at least until this hearing, to give counsel an opportunity to be heard on the matter of disclosing the preliminary hearing facts.

My statement of fact is about 40 pages in length, and it's basically a summary of the testimony at the preliminary hearing. And, as the Court well knows, the transcript was sealed by Judge Dabney pursuant to a defense request. And it is the defense's position at this point in time that a disclosure of the information would possibly prejudice Mr. Diaz' right to a fair trial.

However, at this point in time the People would request that the transcripts be made public as well as the points

and authorities that I filed that are not technically sealed by this Court at this point in time.

The reason being is we are dealing with a case that is now approximately a year and several months after Mr. Diaz' arrest, and this March will be two years after the date that the offenses were allegedly committed. Certainly a passage of time dulls the public's interest, and I think the public's interest in this case has been dulled in the sense that it has gotten and received very little news coverage for many, many, many months. And we arrived at the point in time where the public's right to know certainly must be considered by our office and by the Court. And obviously Mr. Diaz has a right to a fair trial. However, we have to balance competing interests. And at this particular point in time the People feel that a disclosure of the evidence, as evidenced by the preliminary hearing transcripts and my points and authorities, would not damage Mr. Diaz' rights to a fair trial.

This case is not going to be going to trial for a number of months from now. And the staleness and remoteness are weighed against the public's right to know. People feel that it's about time that the case is made public.

THE COURT: You're moving without notice now for an order to unseal the transcript of the preliminary hearing?

MR. MAGERS: That is correct. In addition to that, I would request that the points and authorities in opposition to Mr. Lee's motion be filed in the Court file and be subject to public perusal like any other document.

THE COURT: They are so filed. It just happens that during this week, when you gave them to me — I'm glad you brought them over to me. But they had a file stamp on them and came to me by you with the file.

It happens that I've been working on it every spare moment. I've been in a jury trial, as well. But you've had an exhaustive amount of material, and I was working on them in chambers ever since. But there's been no order sealing any document filed in this case.

MR. MAGERS: I appreciate that. However, I have had certainly requests for the documents, but I have not complied with those requests from other people simply because I wanted to maintain the status quo until this hearing. And I would —

THE COURT: All right. Mr. Lee, this may come as somewhat of a surprise to you.

MR. LEE: Well, Your Honor, the nature of Mr. Magers' motion is quite a change from the status quo. It would evoke quite a change from the status quo.

Preliminarily I would object to any change at this time, although Mr. Magers is correct that there has not been much media coverage or mention of the circumstances behind Mr. Diaz' case is correct.

The fact remains, as I'm sure the Court is aware, that the public interest can be very easily aroused. Witness the recent attempt to parole one of the convicted killers of Sharon Tate. When that matter came up, there was a great public outpouring of support for Miss Tate's family.

THE COURT: Mr. Lee, I'm going to do this. If you have opposition to it, the Court also is now in a matter of — this is a sudden change on the part of your opposition.

I think this matter should be regularly argued. Points and authorities and an opportunity for both sides to be heard, having had time for preparation for such a motion. I'm going to continue your motion, and we'll hear that on

the 7th at the same time. In the interim I want to maintain the status quo until the 7th. Absent some showing on the part of defense, I am probably going to grant your motion.

MR. MAGERS: With reference to my points and authorities, Your Honor, how would you wish me to proceed at this time? They have not been —

THE COURT: I have not made a gag order in this case.

MR. MAGERS: In other words, the points and authorities in this case would be deemed a public document at this time?

THE COURT: I'm afraid so.

MR. MAGERS: Very well.

THE COURT: Which probably will make the other one moot. But I know of no authority to seal some document that you're relying on in support of your position as to a legal motion.

MR. MAGERS: That's correct. And, of course, we are. That's —

THE COURT: That's different from just sealing a transcript of the preliminary hearing. But to go on and to seal documents filed in an ongoing case —

MR. LEE: Your Honor, with regard to Mr. Magers' comprehensive 39-, 40-page statement of the facts in his response to the defense 995 motion, I would request that the Court hold that from public inspection because, as Mr. Magers has already indicated, it is a very comprehensive review of the preliminary hearing transcript.

THE COURT: Well, what's my authority?

MR. LEE: Well, Your Honor, it would appear to me that if the Court were to rule in favor of the defense — and I'm not committing the defense to the position that we desire to have the transcript remain sealed at this time. It's something I would like to investigate with co-counsel and with my client, as well.

But to permit a public examination at this time of the points and authorities of the People would, in effect, grant the People's motion in advance of any hearing already or any opposition by the defense.

THE COURT: Well, I've read these points and authorities. As I've indicated, I've been working on them since they were given to me Tuesday. And, for the record, I have to agree with you and what Mr. Magers has already said, that his points and authorities are comprehensive analysis of the testimony given.

You are quite correct. His points and authorities are a detailed summary of all the evidence.

MR. LEE: And I might also add, Your Honor, that they are the characterization of the evidence by a proponent for one party.

I certainly think that we could, if we were to do the same thing, our statement might vary somewhat from that that has been presented by Mr. Magers.

MR. MAGERS: The fact remains, Your Honor, that is a public document. And certainly Mr. Lee had the opportunity to do a comprehensive review of the evidence in this case and submit his own points and authorities, which he failed to do. I took it upon myself to do it, and I worked very diligently for a period of about two and a half to three weeks, going through the transcript.

THE COURT: Oh, yes. And I don't think anybody is going to impute to you, sir, that you were trying to end around some order of the magistrate to seal the transcript. No, I don't think there's anything like that at all. You made those for this Court as a summary of weeks of testimony to assist the Court in the 995 motion. The Court should not indicate at all that anything is being imputed to you that you are trying to end around the magistrate's order sealing the transcript by now filing a public document.

Mr. Lee, I agree. If I don't in some fashion seal or preclude the public from getting to the District Attorney's document, file we're talking about, it will make the motion to unseal the transcript moot.

MR. LEE: Precisely, Your Honor.

THE COURT: And it will be the first time that the public has received any information with regard to the facts of this case, and they will be receiving it from an adversary's point of view, you adversary's point of view.

MR. LEE: Exactly.

I believe, Your Honor, the Court has the inherent —

THE COURT: I'm going to make this order, trying to retain the status quo. I'm going to order that the document filed by the District Attorney not be made public pending the motion on February 7. However, absent a very strong showing on the part of the defense in this matter, I will be unsealing the transcript and this document on that date.

Anything further?

MR. MAGERS: No, Your Honor.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

Criminal (1)

PEOPLE

VS.

ROBERT RUBANE DIAZ

Date & Dept. of Hearing: 01-21-83 14

NO. CR-19889

P. MAGERS, Deputy District Attorney
Counsel for Plaintiff

J. LEE, Deputy Public Defender
for Defendant

FURTHER PROCEEDINGS RE: 995 PC

Motion & Motion for Correction of Transcript

VIOLATION OF SECTION(S), (COUNTS & DEGREE)

187PC (Ct I thru XII)

Spec. Circum. 190.2(a)(3)PC

K. SMITH, Reporter

CUSTODY STATUS: Jail

People move to make Prelim. Transcripts + Points + Auth open to the public. Motion ordered con't to 2-7-83 at 9 AM D/14.

Court orders documents not be made to the public pending further hearing.

Continued to 2-7-83 at 9:00 A.M. in Dept. 14 (3-5 days)
BARNARD, Judge
E. Jones, Clerk

Reporter's Transcript of Proceedings of September 30, 1983.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS.

ROBERT RUBANE DIAZ,
Defendant.

No. CR-19889.

Before Hon. John H. Barnard, Judge, Dept. 14.

THE COURT: In the matter of Robert Diaz.

MR. LEWIS: Yes, Your Honor, Michael Lewis, Public Defender, and John Lee, Public Defender, appearing with Mr. Diaz. We are ready to proceed on his matters if the Court wishes to take them at this time.

MR. MAGERS: Pat Magers appearing for the People. People are ready to proceed.

THE COURT: All right. We'll take the matter now.

MR. LEWIS: Yes, Your Honor. There are a number of matters that were called for motion this morning. However, there is another matter we wish to take up at this time which may affect the relevance of a number of those motions.

At this time Mr. Diaz wishes to advise the Court that he will waive his right to a trial by jury in this matter and wishes that this Court sit as the trier of fact in this case. It is our understanding the People will join in this motion. And I use the term "this Court" specifically, because Mr. Diaz wishes it to be understood that the waiver is made with the understanding that this Court and, more specifically, Your Honor, will be the judge who will sit during the trial.

MR. MAGERS: That's correct.

THE COURT: Is that correct?

THE DEFENDANT: Yes, I understand.

THE COURT: And you'll be giving up that right.

THE DEFENDANT: I'm giving it up.

THE COURT: And if you give up that right, then you will give up the right to this Court — I understand it is a waiver individually to this Court.

People — I believe this is appropriate, anyway, but do the People have any objection to that?

MR. MAGERS: No, Your Honor.

THE COURT: You're talking to your counsel. Anything that you want to say to me?

THE DEFENDANT: I think Mr. Lewis made it quite clear, the only way I am waiving, and I want to emphasize it, that the case would be tried before this Court and before Judge Barnard.

THE COURT: I understand it's a waiver of jury trial before this Court.

You also are giving up one other factor. It is the duty of a trial judge, even with a jury, a duty he cannot abandon, to independently evaluate the findings of the jury. First of all, if the trial judge has reasonable doubt, he would have to set aside the jury verdict. Do you understand that? You'll be giving up that right, because there won't be a jury. You understand that? And in the question of sentencing, if the jury in the sentence portion of the special circumstances proceedings were to return a decision, a verdict, that the punishment, you would be subject to the death sentence, a trial judge has the absolute duty

to independently evaluate that, and if he disagrees, to set that aside and impose life without possibility of parole.

In the sense that you will not be having a jury, you'll be giving up that right. You understand that?

THE DEFENDANT: Yes, I do.

THE COURT: The case will be tried before a judge. Anything about this that I've said that you didn't understand that has not been talked over before with your attorney?

THE DEFENDANT: No, we discussed it quite thoroughly. I understand all of it.

THE COURT: And do you have any questions at this time?

THE DEFENDANT: Not at this time.

THE COURT: Do you want some time to talk to your attorneys about it?

THE DEFENDANT: No.

THE COURT: Are you prepared, then, for me to ask you if you personally waive trial by jury?

THE DEFENDANT: Yes.

THE COURT: On both phases that I've been talking about of the special circumstances case?

THE DEFENDANT: Yes.

THE COURT: All right. Defense counsel has already personally waived. That's correct. I believe the Court is straight. The defendant has made the motion. People have joined in the motion, and the defendant has personally waived trial by jury. Find the waivers good. Order that they be entered.

Next matter?

MR. LEE? Yes, Your Honor. As the Court is aware, we had previously filed for this date I believe a total of five motions. One is a motion pursuant to Witherspoon and Hovey, and then also a challenge of the venire panel, panel selection. Those two motions, insofar as they relate directly to the jury, are now moot with the Court's acceptance of the waiver. We would request the Court to permit counsel to withdraw those motions.

There remain three other motions. One is a discovery motion. Following its filing with the Court, Mr. Magers and I have been in discussions, and I believe we resolved all matters pertaining to this particular motion, so the Court need not take up that matter, either.

That leaves the motion in limine with regard to certain evidence we anticipate may be introduced pursuant to, may be introduced at trial, and also a motion in the alternative, somewhat related to the same, pursuant to Penal Code Section 954, to-wit, a severance of counts, particularly Count III from the remaining, from the other 11 counts alleged.

Mr. Magers has advised me that he desires more time to respond to those particular motions. With the Court's permission we would request a new date to be set for those motions of the 14th. I anticipate before that time Mr. Magers will provide both defense counsel and the Court with his responding authorities.

THE COURT: All right. Those motions will be continued to October 14 at 8:30. Trial date will remain as previously set. The motions pertaining to jury are withdrawn. Discovery is still pending, but it probably will be resolved, is that correct?

MR. LEE: I anticipate in all probability it will be resolved, Your Honor.

One more item. The Court has us set on October 5, I believe, for a T[illegible]. We are due to appear before the District Court of Appeals in San Bernardino that same day. We would request that the TRC also be continued over to the same date of the 14th.

MR. MAGERS: That's fine, Your Honor.

THE COURT: So ordered.

MR. LEE: Thank you, Your Honor.

THE COURT: Now, in regard to particularly orders that this Court has made up to this point sealing certain portions of proceedings in this matter, those motions, those orders were made solely upon the premise of a jury trial. It seems that those orders should be vacated.

MR. LEE: Well, Your Honor, I would, I would beg to differ. My feeling is that with the actions that have been taken by the Press-Enterprise and by the People subsequent to the Court's ruling, the Court has, in effect, lost jurisdiction on that particular aspect of the case. That matter is presently before the DCA. There are, I'm sure, questions of mootness, but those are certain arguments that I plan to raise before the DCA on Wednesday. And I would request the Court to —

THE COURT: I can't agree with you that an ongoing order of the control of my file in a pending case ever becomes moot until the case is closed.

MR. LEE: Well, perhaps I'm using the word mootness incorrectly, Your Honor. My feeling is that the last order of the DCA was to require respondent or real party in interest to show good cause why your order of February 10th should not be vacated.

THE COURT: I'm familiar enough with appellate decisions to understand that even though sometimes something is moot, to say although the question is moot the question is of some importance, that we will go ahead and make the ruling. I'm sure that —

MR. LEE: My argument precisely, Your Honor.

THE COURT: I will give you until next Friday to give you time to show good cause to show why not.

MR. LEE: Your Honor, could we have until the 14th?

THE COURT: I want to do it quickly.

MR. LEE: The reason that I am asking for the 14th is we have other arrangements pursuant to Mr. Diaz's defense that requires us to be out of town that day.

THE COURT: What day next week can you be here?

MR. LEWIS: It would not be a hearing before the hearing on the DCA. Your Honor, we will be gone on both Thursday and Friday, and the hearing is on Wednesday. So we prefer some day, preferably at least, well, Tuesday of the next week? Monday is a holiday. We'd request the 12th then at the earliest.

THE COURT: People?

Do you want to be heard?

MR. MAGERS: I'll submit it, Your Honor. Obviously the Court has the jurisdiction to reverse itself.

THE COURT: You can address yourself to the subject rather quickly. If you cannot, I'm going to vacate my order. I'll give you an opportunity to be heard, but I'm not going to let it sit around.

MR. LEE: May we have until the 12th then, Your Honor?

THE COURT: That's too long.

MR. LEE: May I confer a moment?

MR. LEWIS: Yes, Your Honor, could we have the afternoon of the 5th? The hearing is that morning in the DCA, and they may give —

THE COURT: All right. 1:30 on October 5, Department 14, to show cause why my previous order should not be vacated in regard to sealing transcripts.

MR. LEWIS: I'm sorry. The Court said October 14?

THE COURT: October 5, 1:30, in Department 14.

MR. LEWIS: Thank you.

Reporter's Partial Transcript of Proceedings of October 5, 1983.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
ROBERT RUBANE DIAZ,
Defendant.
NO. CR-19889.

Before Hon. John H. Barnard, Judge, Dept. 14.

THE COURT: In the matter of Diaz.

MR. LEE: Your Honor, Mr. Diaz is present in court, represented by John Lee of the Public Defender's office and co-counsel Michael Lewis, the Public Defender for the County of Riverside.

The matter's before the Court once again to review the matter of whether or not the preliminary hearing transcript should now be made available to the public.

In the time since we last heard the matter I've been able to do a little bit of research. And I would — I feel that there's a Code of Civil Procedure Section 916 which is dispositive of this particular matter.

As the Court is aware, there is now and, as a matter of fact, we heard oral argument this morning before the Fourth District Court of Appeals regarding whether or not the preliminary hearing transcript should be made available. That matter has been submitted to the Court this morning. And there was some discussion during the morning's arguments as to what the Court could do today.

My feeling is that 916 is dispositive, that while the matter is still pending before the Court of Appeals, that

this Court should maintain the status quo, that is, keep the preliminary hearing transcript in its present state, that is, unavailable to the public, until such time as there is a definitive ruling.

There is also a certain problem as to whether or not the waiver of jury trial by Mr. Diaz renders the issue moot.

My understanding of the case law, particularly that as suggested in Kipnis. It's reported at 5 Cal. App. 3rd, 980. There the Court appears to say that the trial court has within its discretion, it may permit the withdrawal of a jury waiver.

Now, granted, the Court in this particular instance has accepted the jury waiver. But defense counsel foresees a possibility, certainly not a probability and certainly not something that we are actively looking for, but a situation whereby the jury waiver which we entered into might be, we may move to retract. I'm not saying that that is a certainty, but it is a contingency that I feel, as defense counsel, I should make Mr. Diaz aware of.

One of the situations that I could foresee is, again, legal necessity which would require a declaration of a mistrial, either your illness, Your Honor, or perhaps illness on the part of either defense counsel, which could necessitate declaration of a mistrial. Yet at this point in time I cannot foresee, you know, our respective health or the manner in which the case will actually be tried. But there is the possibility of a mistrial. And, should that be the case, I think that defense may want to reassess its position with regard to the jury waiver.

The Court will recall that last week the waiver, certainly my understanding of the waiver, was a conditional one to Your Honor hearing the case, sitting as the trier of fact.

If that condition should fail, then I feel the waiver would then be, we would be in the state that we were prior to last Friday, that is, a situation where we could reconsider whether or not we still wanted to have the waiver in effect.

So, based upon the possibility, admittedly a tenuous possibility but nonetheless the possibility of a mistrial requiring a review of trial strategy, and also Code of Civil Procedure 916, we feel that the Court should maintain the present status quo of the transcript.

MR. MAGERS: At this time, Your Honor, we are approximately three weeks from the trial date. These transcripts have been sealed since the commencement of the preliminary hearing in July of 1982. People certainly acknowledge the public's right of access to the information.

However, at this time the People would urge the Court to maintain the status quo pending the trial date of October 31st. That's our position.

THE COURT: Have you anything to say in regards to the Code of Civil Procedure section?

MR. MAGERS: No, Your Honor. Just that it is our position that we should maintain a position of status quo at this point in time, without releasing the transcript. Pending the trial in three weeks.

THE COURT: Then you are, in effect, joining with the defense counsel?

MR. MAGERS: I'm concurring with Mr. Lee.

THE COURT: Your concurrence is based simply on the fact that you just want to keep everything even?

MR. MAGERS: That's correct.

THE COURT: No possibility of some problem.

MR. MAGERS: That is correct. Because the People do anticipate some potential problems with the release of the transcripts, and in three weeks we could be faced with a jury trial situation. Certain things may develop which would necessitate possibly a jury waiver withdrawal. Death of Your Honor or a variety of other unforeseeable events. And I don't see why we just can't maintain the status quo right now. It's only three weeks away from our trial date. And when we start evidence on October the 31st, it will be a public trial, and I anticipate an opening statement on that date which, of course, will be an outline of the People's case.

THE COURT: Both attorneys' observations in regard to a possibility of something occurring that might at some point produce a change, is correct. We don't have to look through the whole list of horribles. There are many ways in which it happens that cases just don't proceed smoothly on the line outlined. So I'm not discounting that.

But I have a deep concern that at this point what you're talking about has to be balanced against the fact that there is a jury waiver and that there is no basis for my order other than the fact that it was a jury trial. I didn't make my order on the possibility. I made my order upon the facts that existed, that there was a jury trial.

Now, there isn't a jury trial. There may be one, but there isn't one now. And I am concerned that there's any jurisdiction, even any discretion left for me.

MR. LEE: Well, Your Honor, the case, the remedy should the Court today order the preliminary hearing transcript made available to the public would create a situation whereby the defense or, for that matter, if Mr.

Magers were to care to join, would create a situation whereby a writ of supersedeas may be petitioned for.

We are now, as Mr. Magers pointed out, three weeks away from court, from trial, actual presentation of the evidence. My feeling is that, given the fact that we will have a full-blown trial with fully prepared cross-examination and direct examination of the witnesses, that once the trial commences, it would probably serve the public's right to know, public's right of access more completely, to have that presentation, that availability, than the preliminary hearing transcript which, as the Court is aware, is basically the presentation of the minimal amount of evidence the prosecution feels is necessary to make the requisite showing.

The case law discussing writs of supersedeas generally states that the effecting of an appeal operates and deprives the trial courts of at least that aspect of the case which is being appealed. And my feeling is that the case law regarding writs of supersedeas, and also of 916, deprive this Court of jurisdiction of that particular matter.

Now, I can see where there may be a different construction based upon the orders that have been issued by the District Court of Appeals. But I feel that 916 nevertheless at this point in time is controlling.

THE COURT: Don't misjudge the nature of my previous comments. Thinking about this trial, thinking about the three parties, that is, prosecution, the defense, and the judge, I cannot but concur in both of your approaches, that the easiest thing to do is simply hold the status quo until opening statement and then, boy, oh, boy, there it goes. That's the easiest way.

I am not convinced that 916 deprives me of jurisdiction to do anything. On the contrary, I believe that the facts and the existence, the change of facts, have reduced my area of discretion.

Now, whether or not there is or is not open to the Court is discretionary, because it's statutory and it's addressed to discretion. I think both of you got through this morning arguing. But, in any event, I'm still approaching it on the fact that it's discretionary, and discretion is not, there is nothing left that I can see at this moment that is adequate for me to exercise my discretion to continue the sealing of these, absent, perhaps, that perhaps I do not have jurisdiction on that.

In that regard I will take the matter under submission. I want to research the cases on this. I am aware that we're talking — I would invite you, of course, to proceed by way of writ to review an order. Certainly I would not look askance if you do it. And that, in and of itself, will probably stay anything for the amount of time that's necessary before we go to trial. But, still, that's not what I'm looking at either. I'm looking at, do I have any discretion. Not balancing us, people in this courtroom, at this moment, but do I have the discretion of the other issues that are raised from sealing something from the public, that is the public's interest. The open court problem.

I'll take your matter under submission. What's your next appearance, counsel?

MR. LEE: We're before the Court on a couple of remaining pretrial motions on the 14th of October.

THE COURT: I know I'm selecting a jury. I would not be able to do any additional research today. The 14th?

MR. LEE: That's correct.

THE COURT: That's one week.

MR. LEE: That would be approximately ten days from today.

THE COURT: I'll issue my order on that date.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
Criminal (1)

PEOPLE
VS.
ROBERT RUBANE DIAZ

Date & Dept. of Hearing: 10-05-83 14
NO. CR-19889

P. MAGERS, Deputy District Attorney
Counsel for Plaintiff
M. LEWIS & J. LEE, Deputy Public Defenders
for Defendant

FURTHER PROCEEDINGS RE: Sealed Transcripts
VIOLATION OF SECTION(S),
(COUNTS & DEGREE)
187PC (Ct I thru XII)
Spec. Circum. 190.2(a)(3)PC

K. SMITH, Reporter

CUSTODY STATUS: Jail

Motion to keep preliminary hearing transcripts sealed is argued by counsel. Matter submitted

Ruling con't to 10-14-83 at 8:30 A.M. in Dept. 14.

BARNARD, Judge

E. JONES, Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
Criminal (1)

PEOPLE
VS.
ROBERT RUBANE DIAZ

Date & Dept. of Hearing: 10-14-83 14
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P. MAGERS, Deputy District Attorney
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VIOLATION OF SECTION(S),
(COUNTS & DEGREE)
187PC (Ct I thru XII)
Spec. Circum. 190.2(a)(3)PC

K. SMITH, Reporter

CUSTODY STATUS: Jail

All previous order Re sealing of Preliminary Transcripts and Deft's 995 P.C. Motion is ordered vacated.

BARNARD, Judge

E. JONES, Clerk

No. 84-1560

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California corporation
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE,
Respondent.

ROBERT RUBANE DIAZ,
Real Party in Interest.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF REAL PARTY IN INTEREST ON THE MERITS

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No. 84-1560

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ROBERT RUBANE DIAZ,
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**On Writ of Certiorari to the
Supreme Court of the State of California**

BRIEF OF REAL PARTY IN INTEREST ON THE MERITS

CONSTITUTIONAL PROVISIONS INVOLVED

California Constitution, Art. 1, sec. 1:

"All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."

California Constitution, Art. 1, sec. 2:

"(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Calfornia Constitution, Art. 1, sec. 15:

"The defendant in a criminal cause has the right to a speedy public trial ....

"Persons may not ... be deprived of life, liberty or property without due process of law."

California Constitution, Art. 1, sec. 16:

"Trial by jury is an inviolate right and shall be secured to all ...."

STATUTORY PROVISIONS

California Penal Code, sec. 868. Open and public examination; exclusion of public upon request of defendant and finding by magistrate, exceptions, person for moral support of prosecuting witness

"The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary

in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except [various identified functionaries] . . . ."

STATEMENT OF FACTS

Real party in interest, Robert Rubane Diaz, was charged by a complaint filed on December 23, 1981 with having murdered twelve hospital patients by administering overdoses of a heart drug.

At the commencement of his preliminary hearing on July 6, 1982, real party moved to close the hearing to the press pursuant to California Penal Code, Section 868. Although many representatives of television stations were present (Cal.S.Ct. opn., attached to petition, A-1), neither the press nor the prosecutor objected to closure. The magistrate found that "the motion should be granted in order to protect the defendant's right to a fair trial" (Tr. Vol. 1, p. 12) and accordingly closed the hearing.

The hearing lasted a total of 41 days. The defendant was held to answer on all counts and the reporter's transcripts of the preliminary hearing were sealed until further order of the court. (J.A., p. 37.)

On January 21, 1983, more than six months after the initial closure order, the prosecution moved in respondent superior court to unseal the transcripts of the preliminary hearing. Two weeks thereafter, on February 7, petitioner joined in the prosecution's motion.[1] Real party filed an opposition, claiming that the release of the transcripts would result in prejudicial publicity. On February 10, respondent court found that there was "a reasonable likelihood that release of all or any part of the trans-

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[1] We note that the opinion of the California Supreme Court mistakenly represents that the press made the initial motion, joined in by the prosecution.

cript might prejudice defendant's right to a fair trial." (J.A., p. 60.) Accordingly, the court declined to unseal the transcripts.

On September 30, 1983, the defendant waived his right to a jury trial. Respondent court promptly ordered the transcripts of the preliminary hearing unsealed.

The Court of Appeal of the State of California, Fourth Appellate District, Division Two, denied petitioner's petition for writ of mandate for review of respondent court's actions. The California Supreme Court granted the petition and retransferred to the Court of Appeal. The Court of Appeal again declined to disturb the trial court's ruling. The Supreme Court again granted review, and on December 31, 1984 issued its opinion which forms the basis of this proceeding.

SUMMARY OF ARGUMENT

At issue in this case is the right of a California criminal defendant, in a highly publicized case, to close his preliminary hearing to the press and public when necessary to protect his right to a fair trial. Equally significant is the question of the proper deference to be accorded the states in recognizing individual liberties under their own constitutions more expansive than those guaranteed by the Federal Constitution so long as those liberties do not infringe upon weighty Federal constitutional rights.

Real party in interest, Robert Diaz, was successful in closing his preliminary hearing pursuant to recently amended California Penal Code section 868, which authorizes closure upon request of the defendant and a showing that closure is necessary to protect his right to a

fair trial. The California Supreme Court upheld the constitutionality of the statute and further determined that closure had been proper in the instant case because real party had met his burden of showing a "reasonable likelihood of substantial prejudice" to his fair trial right.

Section 868 has provided strong protection of a defendant's right to close his preliminary hearing for more than one hundred and thirty years. The right has long been considered a "fundamental safeguard" of a defendant's right to a fair trial as well as his right to protect his reputation.

Those rights may well be more expansive than analogous rights recognized by the Federal Constitution. Nevertheless, the federal interest upon which they impinge -- the public's right of access to preliminary hearings -- is not so substan-

tial as to justify interference with the state's weighing of those rights. Access to preliminary hearings does not further the same weighty interests advanced by criminal trials primarily because the preliminary hearing is not a final adjudication and so, on the one hand, is not so critical as the trial itself or other pretrial hearings that do result in final rulings on issues other than culpability, and, on the other hand, creates a significant risk of prejudice to the defendant's right to a fair trial. Whatever the parameters of the federal interest in access to preliminary hearings, that interest is adequately accommodated by California's requirement that a defendant be entitled to closure only upon a showing of a "reasonable likelihood of prejudice" to his fair trial right.

ARGUMENT

I. CALIFORNIA PENAL CODE SECTION 868 REFLECTS A LONG-STANDING LEGISLATIVE INTENT TO ACCORD DEFERENCE TO A CRIMINAL DEFENDANT'S INTEREST IN CLOSING HIS PRELIMINARY HEARING.

California Penal Code section 868 was amended in 1982 to require the magistrate to exclude from the preliminary hearing all but persons necessary to the proceeding, "upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial". (Full text set forth, supra, at p.1.)

For a hundred and thirty years prior to the 1982 amendment, section 868 had afforded the defendant the right to close his preliminary hearing at will.[2]

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[2] In 1851, the California legislature adopted the Field Code on Criminal Procedure's provision on mandatory closure. In 1872 the legislature amended the provision so as to further emphasize its mandatory nature by changing "shall
(Continued)

Provision for mandatory closure was motivated by the concern that publicity poses a threat to an accused's fair trial rights[3]. While mandatory closure was recognized as a limitation on press access (People v. Elliot, supra, 34 Cal.2d at 504), the defendant's rights to a fair trial by jury and "to protect his name from being maligned at a preliminary examination"[4] were deemed to be

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... exclude" to "must ... exclude". (Geis, "Preliminary Hearings and the Press," 8 U.C.L.A. Rev. 397, 410 (1961).) Thereafter the Legislature declined to remove the mandatory language for another 110 years despite the fact that during that 110-year period the legislature amended the statute five times (four times since 1957), reflecting considerable legislative attention. (See West's Annotated California Codes, historical note following Penal Code section 868.)

[3] The 1872 Code Commissioners, in explaining their strengthening of the section's mandatory language, commented:

"If the examination is 'necessarily public' . . . the testimony will be spread before the community, and a state of opinion may be created which will render it difficult to obtain an unprejudiced jury . . . ." San Jose Mercury News v. Municipal Court, 30 Cal.3d 498, 509, 638 P.2d 55 (1980).

(Continued)

paramount. (People v. Elliot, 54 Cal.2d 498, 504-505, 354 P.2d 225 (1960).)[5] Accordingly, section 868 was viewed as a "fundamental safeguard" of a "substantial" right, the violation of which was per se reversible error. (Id.) The right to protect one's reputation was given increased stature in 1974 when it was expressly incorporated into the list of inalienable rights guaranteed by the California Constitution.[6]

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[4] "The Legislature has specifically conferred upon an accused the right to protect his name from being maligned at a preliminary examination. This protection is too important to the innocent, as well as the guilty to permit it to be ignored by the committing magistrate." People v. Elliot, 54 Cal.2d at 505.

[5] "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution." People v. Elliot, 54 Cal.2d at 54.

[6] "All people are by nature free and independent and have inalienable rights. Among these are pursuing and obtaining safety, happiness and privacy." Cal. Const., Art. 1, § 1. See, e.g., Hooper v. Deukmejian, 122 Cal.App.3d 987, 1015 (failure of the Attorney General to seal conviction records that were required to be sealed

In 1982, the California Supreme Court unanimously confirmed the constitutionality of section 868, deferring to the Legislature's limited discretion to articulate narrow exceptions to the judicial weighing of fundamental interests. San Jose Mercury News v. Municipal Court, 30 Cal.3d 498, 514, 638 P.2d 55 (1982)(opn. by Newman, J.).

In response to that decision, the California Legislature amended the section to read as set forth above. The Legislature clearly intended "that preliminary hearings should be public unless there was conflict with the defendant's right to a fair trial." (Press-Enterprise Co. v. Superior Court, 37 Cal.3d 772, 779 (1984).) However, its rejection of various bills proposing standards for closure reflected its intent that "the courts should determine the standard to be applied in weighing the

public's right of access against the defendant's fair trial right." (Id.)[7]

II. ANY FIRST AMENDMENT RIGHT OF ACCESS TO PRELIMINARY HEARINGS IS NOT A FUNDAMENTAL INTEREST AND CERTAINLY IS LESS COMPELLING THAN THE RIGHT OF ACCESS TO TRIALS.

This Court has recognized that states have a "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). That right is entitled to deference unless the state-

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[7] Cf. Penal Code section 868.7, enacted at the same time as the amendment to section 868, which provides for closure, upon motion of the prosecutor, of the preliminary examination, during the testimony of witnesses whose "life would be subject to substantial risk in appearing before the general public", and minor sex crime victims, "where testimony would be likely to cause serious psychological harm to the witness". For both categories of witnesses, closure is to be ordered only "where no alternative procedures are available" that would avoid the perceived harm and, in any case, "a transcript of the testimony of such witness[es] shall be made available to the public as soon as is practicable."

recognized liberty infringes upon a substantial Federal constitutional right. (Id. at 93, Marshall, J. conc.) For the reasons urged below, Robert Diaz, real party in interest and the defendant in the preliminary hearing below, respectfully submits that the federal interest in public and press access to preliminary hearings conducted in California is not so substantial as to merit interference with the state's accommodation of the competing rights at issue.

B. Public access to preliminary hearings does not serve the same objectives as access to criminal trials.

In several recent cases, this Court has found that the press and public have a qualified First Amendment right to attend criminal trials. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606; Waller v. Georgia, 467 U.S. 39, 81 L.Ed.2d 31, 37 (1984); Richmond Newspapers v.

Virginia, 448 U.S. 555, 569 (1980) (plurality opinion). That right extends to the jury voir dire proceeding. (Press-Enterprise Co. v. Superior Court, 464 U.S. 501.) In addition, Justices Blackmun, Brennan, Marshall, White and Powell have noted the existence of a qualified constitutional right to attend pretrial suppression hearings, although all but Justice Powell based that right on the sixth Amendment right to a public trial. (Gannett v. DePasquale, 443 U.S. 368 (1979).) Moreover, all five suggested distinctions between suppression hearings and preliminary examinations for purposes of the public's right of access. Thus, this case presents the Court with its first opportunity to squarely address the question of whether the First Amendment guarantees a right of access to pretrial hearings, and if so, how significant a right it is.

The Court has identified "two features of the criminal justice system . . . [that] serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment": (1) "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole"; and (2) "the criminal trial historically has been open to the press and general public". (Globe Newspaper, 457 U.S. at 605-606.)

The right of access to criminal trials gives rise to a presumption of access to pre-trial (or even non-trial) proceedings only to the extent that the societal objectives served by openness are similar. The Court's decisions in Richmond Newspapers and Globe Newspaper may not "carry any implications outside the context of criminal trials." Globe

Newspaper, 457 U.S. at 611 (O'Connor, J, conc.). "Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." Richmond, 448 U.S. at 589 (Brennan and Marshall, JJ., conc.).

Societal objectives that public access to trials is deemed to advance include: (1) assurance of a fair and accurate adjudication of guilt or innocence (E.g. Estes v. Texas, 381 U.S. 532, 538-539 (1965); Richmond Newspapers, 448 U.S. at 593 (Brennan and Marshall, JJ., conc.)); (2) appearance of fairness, maintenance of public confidence in the criminal justice system, and community catharsis (Press-Enterprise, 464 U.S. at ___, 78 L.Ed. at 637; Globe Newspaper, 457 U.S. at 606); and (3) public education

about important government functions. information (Gannett, 443 U.S. at 397 (Powell, J., conc.)).

Petitioner and amici urge two main reasons -- procedural similarities between trials and preliminary hearings, and the increasing importance of preliminary hearings in California - why access to preliminary hearings advances the same values as access to trials. We submit that such arguments are unconvincing because of significant differences in function and form between preliminary hearings and trials,[8] and because preliminary hearings do not result in final adjudications and so "are not critical to the criminal justice system" in the way that trials and suppression-of-

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8 "[P]reliminary hearings are not critical to the criminal justice system . . . and they are not close equivalents of the trial itself in form." Gannett, 443 U.S. at 437.

at 437.)[9]

1. The crucial difference between preliminary hearings and trials for purposes of analyzing the objectives served by access is that preliminary hearings are not final adjudications.

A highly significant difference, however obvious, between trials (and suppression hearings) and preliminary hearings is that preliminary hearings are not final adjudications.[10] Thus, while defendants undoubtedly desire to prevail at preliminary hearings, the prosecution's burden of establishing probable cause is generally so readily met that defendants rarely offer any defense, recognizing that

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9 We note that our analysis does not rely upon a characterization of the preliminary hearing as "non-adjudicatory" or as part of the "accusatory phase" of a prosecution. (Cf. Respondent's Brief, hereafter "RB", p. 2.)

10 Other pre-trial proceedings that result in final decisions on issues other than guilt or innocence include hearings on demurrers, motions to dismiss, bail motions, change of venue motions in the superior court, and motions to

the liabilities of revealing their strategy and evedence far outweigh any slight possibility of defeating the charges at that stage. Defense counsel may decide not to make even those defenses that depend only on undermining the prosecution's case, due to concern that any defect exposed at the preliminary hearing will later be cured by the prosecution's "discovery" of new evidence.[11] While charges are dismissed or reduced in a significant proportion of cases following the preliminary hearing, those reductions are often obtained by suppressing evidence or otherwise exposing holes in the prosecution's case than by

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disclose the identity of an informant.

11 In California, the trial court, without setting aside the information, "may order further proceedings to correct errors alleged by the defendant [at the preliminary hearing] if the court finds that such errors are minor errors of omission, ambiguity, or technical defect . . . " (California Penal Code Section 995a(b)(1).)

proving an affirmative defense. Counsel's reluctance is likely to be particularly strong in high publicity cases because they generally involve a multiplicity of repulsive allegations, thus making dismissal of charges by the magistrate all the more unlikely.

A feature related to the preliminary nature of preliminary hearings is their timing.[12] "As with other pretrial proceedings, the climate they may generate in advance ot trial cannot always be nullified by relatively simple controls, such as sequestration and exclusion of witnesses, that are available to counter inflammatory publicity at the time of

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The prosecution may refile charges if the first information is set aside. (Penal Code Section 999.)

12 Chief Justice Burger, in declining to find the existence of a sixth amendment right of access to pretrial suppression hearings, noted that "at common law, the courts recognized that the timing of a proceeding was likely to be

trial. (San Jose Mercury News v. Municipal Court, supra, 30 Cal.3d 498, 511.)[13] Although this point is almost too obvious to state let alone emphasize, it nevertheless is central to any analysis of access rights and must be weighed heavily.

2. Access to preliminary hearings does not contribute to the fairness of either the preliminary hearings themselves or the criminal justice system in general.

This Court has concluded that,

> "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously . . . ."

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critical." (Gannett, 443 U.S. at 395). For him, "the essence [of the discussion] . . . is that by definition 'pretrial proceedings' are exactly that." Gannett, 443 U.S. at 397.

13 See also, Richmond Newspapers, 448

Gannett, 443 U.S. at 383. See also, Waller, 81 L.Ed. at 38; Press-Enterprise, 78 L.Ed.2d at 637.)

Fairness is the overriding objective to be served by public access. "The central aim of a criminal proceeding must be to try the accused fairly ...." (Waller v. Georgia, 467 U.S. 39, 81 L.Ed. 2d at 38 (1984). See also,e.g., Estes v. Texas, 381 U.S. 532, 540 (1965). in Nebraska Press Assn. v. Stuart, 427 U.S 531, 586 (1976).)

Justices Blackmun, Brennan, White, and Marshall have suggested that it is precisely the fact that "[e]ach side has incentive to prevail" at trials and suppression hearings that publicity of those hearings advances their actual fairness. (Gannett, 443 U.S. at 434.) The defendant's lack of incentive to prevail at his preliminary hearing seriously detracts from any contributions to

fairness to be gained by public access. In the vast majority of cases, the effect of press access to the preliminary hearing is that the potential jury pool is exposed only and overwhelmingly to the prosecution's evidence.

Petitioner and its amici urge that the procedural similarities between preliminary hearings and trials constitute a strong reason for access. However, it is precisely due to the procedural, even visual, similarities that preliminary hearings bear such high potential for causing prejudice. As noted by the California Supreme Court:

> "Prejudice at times may be acute because of the superficial resemblence between preliminary hearing and trial. . . . The distinct functions served by the two proceedings are not always clear to non-lawyers. They may ascribe to a one-sided preliminary hearing the legitimacy and credibility of a trial. Accordingly, a defendant denied the protection of section 868 might feel compelled to abandon his

> right of silence at the hearing and to embrace a tactic of trying the case in the media."

San Jose Mercury-News v. Municipal Court, supra, 30 Cal.3d 498, 512.

Moreover, real party questions whether public access to preliminary hearings does in fact encourage witnesses to come forward and testify truthfully. California's Attorney General, in defending the value of the secrecy of grand jury proceedings has urged, inter alia, that "witnesses may fear testifying in court; the case may have potential for prejudicial publicity; [and] publicity may jeopardize a continuing investigation . . . ." (Attorney General's brief, cited in Hawkins v. Superior Court 22 Cal.3d 584, 593, n. 6, 586 P.2d 916 (1978). In the instant case, neither the California Attorney General (see brief at pp. 6-8) nor the Riverside County District Attorney (see brief at pp. 8-9), the two representatives in the instant case most familiar with the prosecutorial view of the realities of criminal prosecutions in California, contend that open preliminary hearings will have the salutory effect of encouraging witnesses to come forward and testify truthfully.[14] Certainly, in highly publicized cases, which are chiefly the only ones relevant to the instant inquiry, any additional publicity of the preliminary hearing could hardly be expected to be significant in encouraging new witnesses to identify themselves.

In addition, we question whether public access to preliminary hearings improves the participants' conscientiousness, or only the appearance of conscientiousness. While public access may

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14 For the above-given reasons we strongly disagree with petitioner's suggestion that "the ferreting out of additional witnesses with relevant testimony" may be even more compelling at the preliminary hearing stage.

improve the decorum of all participants, access logically increases the pressure on the magistrate, particularly in high publicity cases, to take public opinion into account in determining whether probable cause exists.[15] A magistrate may be more susceptible to public opinion than a trial judge because his decisions are not final and accordingly he may feel less responsibility to exercise his discretion properly.

3. Access to preliminary hearings does not significantly serve the appearance of fairness or community catharsis.

Appearance of fairness is less significant a value when procedures can be evaluated for actual fairness. Fairness and the appearance of fairness are both satisfied by procedural protections and by

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(Petitioner's Brief, hereafter "PB", at pp. 13-14.)

15 See, e.g., Winsett v. McGinness, 617 F.2d 996 (3d Cir. 1980) (en banc) ("consideration of public reaction could be dangerous to and destructive of procedural due process" in

the right to appellate review. Fairness of procedures is to be contrasted with the fairness of particular adjudicators. Whether a judge is actually biased is difficult to evaluate; what is accessible to evaluation are concrete indicators that raise an appearance of fairness or lack of fairness. For those reasons, appearance of fairness plays a far more significant role regarding adjudicators than procedures.[16]

The interest in assuring the appearance of fairness is "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned ...." (In re Oliver, 333 U.S.

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determining inmate's entitlement to work release), cert. den. sub nom., Anderson v. Winsett, 449 U.S. 1093 (1981).

16 To the extent that the appearance of fairness is deemed a significant value, real party submits that it must give way not only to protections of fairness in fact but also to the presumption of defendant's innocence. One danger

257, 270, n. 25, cited in Gannett, 443 U.S. at 380.) Thus, a closure request by the defendant himself should not impair the appearance of fairness.[17] In any event, release of the transcripts of the preliminary hearing at such time when the risk of prejudice to the defendant's fair trial right has passed, should dissipate any lingering concern over any appearance of unfairness.

Community catharsis is the objective served by the appearance of fairness regarding crimes that arouse shock and outrage in the community.[18] Catharsis is

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posed by an open preliminary hearing is that because of the low burden of proof placed on the prosecution the decision to hold the defendant for trial may turn the presumption of innocence on its head.

[17] Both Oliver, 33 U.S. 257 and Levine v. United States, 362 U.S. 610, 616 (1960), cited by various Justices involved closure of a contempt trial over the defendant's objection. (See, e.g., Richmond Newspapers, 443 U.S. at 594 (Rehnquist, J., conc.).) Accordingly, appearances of fairness were doubly offended by the summary nature of the proceeding as well as by closure over the defendant's objection. Those cases, we respectfully submit, hardly stands as compelling precedent for a broad public interest in the appearance of fairness of preliminary hearings.

(Continued)

achieved less by access to the proceedings themselves than by harsh penalties. Thus, for example, in the case of Dan White, the man who shot to death the mayor and the first gay supervisor of San Francisco in 1979, community catharsis was not achieved, despite public access to and extensive press coverage of the trial, because White was convicted only of manslaughter. Catharsis was only realized upon White's suicide six years later.

Petitioner suggests that "[n]o greater frustration of this fundamental, natural yearning to see justice done' [citation omitted] can occur than when, after a secret preliminary hearing, the suspect is released." (PB at p. 15.) For the above-described reasons, we strongly

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[18] "When a shocking crime occurs, a

disagree with the suggestion that such frustration is a result of secrecy. We submit that the public would be equally frustrated if after a public hearing, charges were dismissed for such reasons as procedural fairness not readily appreciated by the public. The Court's recognition of the existence of the public's frustration, even rage, at lenient punishments in notorious cases suggests all the more reason for insulating preliminary decisions from intense, contemporaneous public scrutiny and pressure.

More important to the achievement of catharsis than public access to preliminary proceedings is the community's opportunity to have the trial occur promptly and within its midst. Open preliminary examinations threaten those interests in that they may force venue changes or delays to dissipate any effects

of publicity.

In California, catharsis is further served by the recently created right of victims and their families to attend and speak at sentencing and parole hearings. (See Penal Code sections 1191.1 and 3043 and section 1767 of the Welfare and Institutions Code.) Because of the court's fairly broad sentencing discretion for serious crimes, input at sentencing and parole hearings provides a more effective and rational method of satisfying the community's desire for catharsis than does access to preliminary hearings.

4. Access to preliminary hearings does not substantially further the public's interest in obtaining information about important government functions.

Access rights also depend in part on the value of exposing particular government functions to public view.[19] However, "because the stretch of this

protection is theoretically endless ... it must be invoked with discrimination and temperance." (Richmond Newspapers, 448 U.S. at 588 (Brennan and Marshall, JJ., conc.).)

Petitioner and some of its amici contend that the public has an interest in access to preliminary hearings because the preliminary hearing is a "critical stage" of criminal prosecutions in California. (See Petitioner's Brief at p. 8.) In reaching this conclusion they rely on cases that have found the preliminary hearing to be a critical stage for purposes of determining the existence of the defendant's right to counsel. (See,

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community reaction of outrage and public protest often follows. [Citation omitted.] Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Richmond Newspapers, 448 U.S. at 571.

[19] This value arises from the "assumption that valuable public debate--as well as other civic behavior--must be informed" (Richmond

e.g., Petitioner's Brief, at p. 8, citing Hawkins v. Superior Court, 22 Cal.3d 584, 588 (1978) and Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). But, there is no rational relation between the fact that the defendant is entitled to the assistance of counsel at a particular stage and the importance of that stage to public debate. Such a contention would argue for access to such procedures as line-ups and in-custody interrogation after the defendant's assertion of his right to counsel.[20]

Petitioner argues that preliminary hearings are critical stages because, "with relatively fewer criminal cases actually going to trial" (PB, pp. 6-7), preliminary hearings are becoming the only

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Newspapers, 448 U.S. at 487 (Brennan and Marshall, JJ., conc.)) and, more particularly, from "the importance of the public's having accurate information concerning the operation of its criminal justice system." (Gannett, at 397

formal judicial hearings held in an increasing number of cases. (PB, pp. 17-18.)

First, that contention is based on a false premise. Available statistics suggest that the percentage of trials in California is actually increasing.[21] Moreover, contrary to petitioner's suggestion (PB, at p. 17, n. 6), recently added Penal Code section 1192.7, precluding plea bargaining after preliminary hearings except in certain limited circumstances, logically should increase the number of trials in California.[22]

(Powell, J., concurring.)

20 A logical extension would be to allow access to any proceedings at which an accused was represented by counsel, such as parole hearings and prison disciplinary hearings.

21 According to petitioner's figures, in the 1983-84 fiscal year, slightly more than 10% of felony arrests were disposed of by trial. However, in 1978, "only 3.2 % of all felony-arrest dispositions in [California] involved trials. San Jose Mercury News, supra, 30 Cal.3d 498, 511, 638 P.2d 655. See also Gannett, 443 U.S. at 435, fn. (Continued)

Second, and more importantly, it is a weak argument that access to preliminary hearings should be made a significant right simply because trials, clearly the critical stage of a criminal prosecution, occur less frequently. As noted by respondent (see RB, at p. 10) that argument logically would imply a right of access to the prosecutor's files, which reflect the most important decisions made -- regarding which charges to press and what plea bargains to make -- in most cases that do not go to trial.

Moreover, public education is equally well served by release of transcripts once danger of taint due to publicity has passed as by public access to the proceedings themselves. To the extent that timeliness of news reporting is important in order to catch the public's interest, sufficient timely information may be provided to the press

and public by counsel. Running newspaper commentary is more likely to distort the information and its significance than would release of the transcripts in toto at some time past the period of likely prejudice.

To the extent that legislative reform is prompted by reactions to ungoing proceedings, as petitioner contends, experience shows that prosecutors and family members of victims -- who are entitled to access despite closure to the general public -- are the people most likely to spearhead any reform efforts.[23]

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[23] While petitioner points to one notorious California child molestation case, the McMartin Pre-School case, as having spawned numberous legislative bills, its conclusion that access to the preliminary hearing played a significant role in generating public interest is not as self-evident as petitioner would have the reader believe. (See PB, at p. 16.) That case received a tremendous amount of publicity at the time that charges were filed, generating sufficient public attention as to attract legislative interest, thus creating a climate in which parents of witnesses, prosecutors, and prosecutor's (Continued)

Justice Powell, in noting a limited First Amendment access right to pretrial proceedings, was careful to observe that "not all pretrial matters are so important for public scrutiny as is a suppression hearing...." (Gannett, 443 U.S. at 397, fn. 1.)

> "[T]he issues considered at [suppression] hearings are of great moment beyond their importance to the outcome of a particular prosecution. A motion to suppress typically involves ... allegations of misconduct by police and prosecution that raise constitutional issues. ... The searches and interrogations that such hear-

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organizations were able to carry their legislative campaigns forward on their own.

The McMartin case equally dramatically illustrates the adverse effects of publicity on fairness of the preliminary hearing itself, threat of prejudice to fair trial rights, and massive damage to defendants', and even witnesses', reputations. All of the out-of-custody defendants have moved from their homes, many to different states. Daily reportage collapses 7 hours of hearings into a few paragraphs of print or seconds of T.V. time. Because the media tend to be more interested in a case at its beginning and more interested in the beginning of each witness's testimony, media attention is paid to the prosecution's case almost exclusively.

> ings evaluate do not take place in public. The hearing therefore usually presents the only opportunity the public has to learn about police and prosecutorial conduct, and about allegations that those responsible to the public for the enforcement of law themselves are breaking it." (Gannett, 443 U.S. at 435 (Blackmun, Brennan, White, and Marshall, JJ. conc. and dis.))

In contrast, preliminary hearings rarely involve such issues of general public concern.[24]

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24 We disagree with petitioner's assessment that suppression motions are "a standard part of the bill of fare" of preliminary hearings in California. (PB, at p. 11.) However, it is undeniably true that preliminary hearings may be joined with suppression hearings, motions to dismiss and other motions that raise constitutional objections. Some witnesses may be called to testify regarding facts relating to more than one hearing. However, the hearings remain distinct and it should be possible to separate the testimony, close the preliminary hearing, and open the others.

C. The defendant's right to close his preliminary hearing has long been recognized, particularly in California.

In Richmond, six Justices stressed the importance of the long history of public trials in recognizing a First Amendment right of access to trials. (Burger, C.J., and White and Stevens, JJ. at p. 580; Brennan and Marshall, JJ. at 589-590; and Blackmun, J. at 601.) The centrality of the tradition of openness is reflected in the court's holding "that the right to attend criminal trials is implicit in the gurantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. [Citation omitted.]" Richmond, 448 U.S. at 580 (emphasis added). Justice Blackmun, in a concurring opinion, noted with gratification that the

Court had moved beyond its denial of the importance of legal history in Gannett and was "now looking to and relying upon legal history in determining the fundamental public character of the criminal trial." Id., at 601.

In its historical inquiries, this Court has looked for more than a tradition of de facto openness.[25] In addition, it has considered : (1) whether there was an historical recognition of any countervailing rights or interests in closure; (2) whether any such presumptions or interests were recognized at the time of the First Amendment's adoption[26] and (3) whether

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25 As noted by the Court, "This argument . . . that since exclusion of members of the pbulic is relatively rare, there must be a constitutional public right to a public trial . . . confuses the existence of a constitutional right with the common-law tradition of open civil and criminal proceedings. Gannett, 443 U.S. at 388, n. 19.

26 See, e.g., Richmond, 448 U.S. at 569: "[A]t the time when our organic laws were adopted, (Continued)

openness was considered an instrinsic aspect of the proceeding.[27]

Consideration of the three above-noted factors argues against finding a tradition of open access to preliminary hearings over a defendant's objections. In Gannett, seven members of this Court concluded that preliminary hearings historically were subject to closure. As Justice Stevens, writing for the Court,

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criminal trials both here and in England had long been presumptively open."; Richmond, at 576: "the First Amendment guarantees of speech and press prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted". (Emphasis added.) See also, Press-Enterprise: "[T]he question we address--whether the voir dire process must be open--focuses on First . . . Amendment values and the historical backdrop against which the First Amendment was enacted." 78 L.Ed.2d at 638, n. 8).

27 "[C]ontemporary writings confirm the recognition that part of the very nature of a criminal trial was its openness to those who wished to attend." Richmond Newspapers, 448 U.S. at 568. That "criminal trial both here and in England had long been presumptively open ... is no quirk of history; rather, it has long been recongized as an indispensable attribute of an Anglo-American trial." Id. at 569.

noted:

> "[T]here exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary. [Footnote omitted.] By the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant. [Footnote omitted.] And pre-trial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials. [Footnote omitted.]" Gannett, 443 U.S. at 387-388.

This historical assessment is consistent with the research of the main authority relied on by petitioner and amici to support a contrary conclusion. (Geis, "Preliminary Hearings, 8 U.CL.A. Rev. 397 (1961), quoted in Petitioner's Brief, at p. 20 and, e.g., brief of amici California news organizations, at pp. 19-21.) Geis notes that "[p]reliminary hearings in the American colonies closely followed the prescriptions of the [English] statutes" which were closed to

the accused as well as the press and public. Geis, pp. 399, 406.

The American statutes remained unchanged until the mid-nineteenth century. Id. at 407. Thus, at the time of the adoption of the First Amendment, American laws provided for closed preliminary hearings. Whether or not there was a practice of opening them to the public [28], there can hardly be said to have been a presumption or right of public access at that time.

The new generation of U.S. statutes enacted in the mid to late nineteenth century was typified by the

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[28] Geis notes that at some point, a trend developed of opening preliminary hearings in practice. (Geis, p. 407.) However, the earliest case he cites as evidence of this developing trend was reported in 1898. Id., n. 54. Most of the cases are from the 1920s and '30s. Id., nn. 53 and 54. Moreover, during the same period, preliminary examinations were presumptively closed in England. See F. Maitland, Justice and Police 129 (1885), quoted in Gannett, 443 U.S. at 389.

provision of the New York Field Code of Criminal Procedure, as revised in 1888.[29] That statute read:

> "The magistrate may also, upon request of the defendant, exclude from the examination, every person, except [various named functionaries and] . . . the defendant and his counsel . . . ."

Id. at 407-408. California and five other states adopted Field Code provisions which varied from the above only in that they made closure mandatory rather than discretionary upon request of the defendant. Id. at 409.[30] Other states adopted similar

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[29] Geis recounts that the original statute required the magistrate to close the preliminary hearing upon request of the defendant. In changing the mandatory "must" to "may", the New York legislature "conform[ed] to the general practice elsewhere in the United States . . . ." Id. at 409.

[30] Geis calls the Field Code provisions "a significant exception to the general practice of public preliminary hearings". Id. at 407. But, practice and law are distinct phenomena. It makes no sense to say that the laws themselves formed an exception to the practice. Significantly, Geis elsewhere suggests that the practice of the Field Code states differed little (Continued)

provisions; still others allow closure of pretrial hearings without statutory authorization. Gannett, 443 U.S. at 390, n. 23. Thus, in both Field Code and non-Field Code states, the defendant was and continues to be entitled to close his preliminary hearing at will or upon a loose showing that did not need to outweigh any competing interests or comply with any guidelines. That the general practice in Field Code and non-Field Code states may have been to hold open hearings does not detract from the historical right of defendants to close their hearings. Rather the practice appears to be due to lack of interest of defendants in asserting their right to closure.[31]

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from the majority because the statutes remained in "judicial dormancy and day-to-day disuse." (Id. at 407)

[31] As Geis notes, "Litigation concerning the Field Code provision has been sparse, and in most of the states the measure has apparently only rarely been called into use, and then only in (Continued)

Finally, there is no evidence of an historical recognition of the value of press and public access to preliminary hearings. To the contrary, English common law clearly distinguished between the privilege accorded the reporting of trials, and the absence of such a privilege of, or of any legitimate societal interest in, reporting pretrial proceedings.[32]

Similarly, the New York Commission that in 1850 recommended adoption of the

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cases which would ordinarily have been heard in closed chambers in any event." (P. 409.)

32 As declared by one presiding Lord:

> "Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. ... But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice."

Rex v. Fisher, 2 Camp 563, 570-571 (NP 1811), quoted in Gannett, 443 U.S. at 389, n. 20.

Field Code's mandatory closure provision reasoned that public access could "render it difficult to obtain an unprejudiced jury" particularly "in cases of great public interest". Commission on Practice & Pleadings, Code of Criminal Procdure, Final Rep., § 202 (1850), cited in Geis, at p. 408.

The tradition of the defendant's right to close his preliminary hearing is even stronger in California. (See pp. 8-10.)

III. IF THE COURT FINDS A RIGHT OF ACCESS TO PRELIMINARY HEARINGS, THEN IT SHOULD REMAND TO THE CALIFORNIA SUPREME COURT FOR DETERMINATION OF HOW THE COMPETING INTERESTS SHOULD BE WEIGHED.

For the foregoing reasons, we respectfully submit that the Court need find no constitutional right of access to preliminary hearings. If the Court should find

that there does exist such a right, then we would urge that Penal Code section 868 and the California Supreme Court's construction of it fully comport with the Federal standard and accordingly that the case should be remanded to afford the California Court the opportunity to reevaluate its own state law in light of any misperception of the Federal law.

The Federal test for evaluating whether a particular criminal proceeding should be open to the public, once a right of access has been found, is set forth in

> Press-Enterprise:
> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Press-Enterprise, 78 L.Ed.2d at 638. In addition, the magistrate should "consider

alternatives to closure and to total suppression of the transcript." (Id. at 640.)

California Penal Code § 868, permitting closure of a preliminary hearing only upon a showing that closure is necessary to protect the defendant's right to a fair trial, clearly satisfies that test. The right to a fair trial is paramount and may override even the public's interest in access to trials. (Globe Newspaper, 457 U.S. 596.) A showing that closure is "necessary" surely satisfies the requirement that closure be proved to be "essential". (See Webster's New Internat. Dict. (2d ed. 1959) p. 1635) The requirements that the magistrate narrowly tailor the closure, articulate findings and consider alternatives are consistent both with section 868 and with the California Supreme Court's holding.

Questions left open by Press-Enterprise include: (1) the standard to be applied in assessing the necessity of closure, and (2) the party who is to bear the burden of showing the effectiveness or ineffectiveness of reasonable alternatives to closure.

Real party submits that those questions properly should be left to the states.

> "If [a] state court has proceeded on an incorrect perception of federal law [in interpreting state law] it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law." Three Affiliated Tribes v. Wold Engineering, ___ U.S. ___, 81 L.Ed.2d 113, 124, 104 S.Ct. (1984).

Remand is particularly appropriate in the instant case because of this Court's policy of allowing states a measure of discretion in prescribing standards and procedures by which to weigh

individual liberties. Thus, in Pruneyard Shopping Center v. Robins, supra 447 U.S. 74 (1980), the Court deferred to the California Supreme Court's decision (reported as Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 592 P.2d 341 (opn. by Newman, J.)) to balance free speech and property rights under its own Constitution so as to give greater weight to the free speech right than this Court had done under the Federal Constitution. This Court's balancing under the Federal Constitution did not limit the state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." (Id. at 81, and supra, at p. 12.) In so ruling, this Court did not go so far as to suggest "that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the

abrogation of common-law rights by . . . a state government." (Id. at 93, Marshall, J., conc.) Rather, the Court concluded that the federal interest violated -- namely, the right to exclude others from a large private shopping mall -- was not so weighty as to preclude states from weighing other individual liberties more heavily. While the Court found that the right to exclude others from private property is "one of the essential sticks in the bundle of property rights" (id. at 82, emphasis added), where the private property at issue is a large shopping mall, no "core" right has been infringed. (Id. at 93)(opn. by Marshall, conc.)

Similarly, we submit that, while the right of access to "critical" stages of criminal proceedings may be "essential", state limitation of access to preliminary hearings does not impinge upon any "core" rights.[33] Accordingly, this Court

should remand the case to allow the California Supreme Court to set its own standards and procedures for permitting closure of preliminary hearings upon the defendant's request.

IV. IF THE COURT DECIDES TO ARTICULATE A BALANCING TEST, THEN "REASONABLE LIKELIHOOD OF PREJUDICE" IS APPROPRIATE.

If this Court should decide that the right of access to preliminary hearings is a core First Amendment right and so decides to articulate the standard for permitting closure as requested by petitioner (PB p. 22-23), real party submits that a showing of a "reasonable

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[33] California's weighing of the defendant's right to a fair trial more heavily than the public's interest in access to preliminary hearings does not signify any disregard for First Amendment rights. As Pruneyard demonstrates, California affords greater protection for some speech rights than does the Federal Constitution. Rather, California has forthrightly recognized the extent of the conflict between fair trial and speech-and-press rights in the preliminary hearing context, and has chosen to grant greater deference to the fair trial right.

likelihood of prejudice" to the defendant's fair trial rights is appropriate. In Waller v. Georgia, 467 U.S. 39, 81 L.Ed.2d 31 (1984) this Court concluded that:

> "the party seeking to close [a pretrial suppression] hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (Id. at 39, emphasis added.)

For the reasons advanced in ¶ II.B.4., supra, closure of a preliminary hearing should certainly require no greater a showing than closure of a preliminary hearing. In particular, we urge rejection of the "substantial probability of irreparable harm" test advocated by petitioner. That standard, articulated by the dissenters in Gannett, and adopted by the Ninth Circuit in U.S.

v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) should be rejected for several reasons. First, the standard is unduly burdensome. It is the same standard adopted by the Court in Nebraska Press Assn. v. Stuart, supra, 427 U.S. 539 for imosing a gag order, "'one of the most extraordinary remedies known to our jurisprudence" (id, a 562). Second, the dissenters based the standard on the sixth amendment right to attend pretrial suppression hearings which, as noted above, they deemed "[u]nlike almost any other proceeding apart from the trial itself, implicates all the policies that require that the trial be public." (Gannett, 443 U.S. at 436.)

CONCLUSION

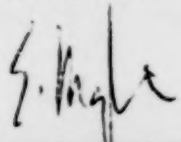
For the foregoing reasons, real party in interest, Robert Diaz, through counsel, urges the Court to find that public access to the California

preliminary hearing is not such a substantial federal interest as to warrant interference with California's weighing of fair trial and free-speech-and-press rights.

Dated: January 13, 1986

Respectfully submitted,

EPHRAIM MARGOLIN
SANDRA COLIVER



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* Robert Diaz and his counsel gratefully acknowledge the volunteer critique of Frank C. Newman, retired Justice of the California Supreme Court and Ralston Professor of International Law.

No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,
VS.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

REPLY BRIEF OF PETITIONER

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I

NEITHER RESPONDENT NOR REAL PARTY IN INTEREST ADEQUATELY JUSTIFY DENIAL OF CONSTITUTIONAL PROTECTION OF THE PUBLIC'S RIGHT OF ACCESS TO PRELIMINARY HEARINGS

Respondent and real party in interest fail to provide any supportable justification for precluding the public's First Amendment right of access to preliminary hearings. The thrust of both parties is that access to preliminary hearings cannot be granted as a matter of constitutional

right because to do so would jeopardize the defendant's right to a fair trial. This does not follow.

As this Court has acknowledged, circumstances may exist in a particular case warranting overriding the public's constitutional right of access in order to assure the defendant's right to a fair and impartial trial. However, as this Court also has recognized, the instances where the defendant's Sixth Amendment right competes and possibly conflicts with the public's First Amendment right are extremely rare, both at the trial stage as well as the pretrial stage. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Nothing presented by either respondent or real party in interest refutes the fact that the interests of the defendant can be properly accommodated by the standards set by this Court in prior decisions.

A. That the Preliminary Hearing Does Not Involve a Final Adjudication of Guilt or Innocence is Irrelevant

Respondent and real party in interest's contention that the First Amendment right of access should not extend to preliminary hearings simply because these hearings do not involve a final adjudication of guilt or innocence is without merit. Neither party explains why this fact alone should preclude constitutional protection of the public's right of access. While the preliminary hearing is not a final adjudication of guilt or innocence (indeed, the trial itself may not be the final phase either), it is nonetheless an adjudicatory proceeding which seriously impacts on the criminal prosecution.

At the preliminary hearing the magistrate determines which charges will be prosecuted and, indeed whether prosecution will continue at all. Without a right of access to this hearing, the public will have no opportunity to

determine independently whether further prosecution is warranted.[1]

Also, to contend that the constitutional right of access is limited only to proceedings involving the final adjudication of guilt or innocence is inconsistent with the decisions of this Court. In *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), the Court recognized that the constitutional right of access extends to the selection of the jury, notwithstanding the fact that the jury selection process clearly is not the final adjudication of guilt or innocence. Nonetheless, this Court determined that as the jury selection was an important part in the effective and fair administration of criminal justice, the public had a constitutional right of access to that proceeding. Similarly, in *Waller v. Georgia*, 467 U.S. 39 (1984), while not

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[1]For example, the Los Angeles District Attorney has recently decided not to prosecute five of the seven defendants in the *McMartin* case after a 14-month open preliminary hearing. This announcement by the district attorney's office came after the magistrate had determined that there was probable cause to hold all seven defendants for trial. Los Angeles Times, January 18, 1986. But for the fact that the preliminary hearing in the *McMartin* case was open, the public would have had no opportunity to evaluate not only the magistrate's determination of probable cause but also the district attorney's decision not to prosecute.

Contrasted with the *McMartin* case is the situation which occurred in the case of *People v. Angelo Buono*, Los Angeles Superior Court Case No. 354-231, commonly referred to as the "Hillside Strangler". In that case, after a 10-month closed preliminary hearing held under the old *Penal Code*, Section 868, and the determination of probable cause by the magistrate, the district attorney sought dismissal of the charges because of the credibility of a key witness. The trial court refused to dismiss the action and the prosecution was ultimately turned over to the state attorney general. Because the public was precluded from attending the preliminary hearing, it had no opportunity to evaluate independently the credibility of the key witness, nor to evaluate the district attorney's request for dismissal.

deciding the First Amendment issue, this Court determined that the hearing on a motion to suppress evidence, which also does not involve a final adjudication of guilt or innocence, must be open unless closure is justified under the standard set in *Press-Enterprise*.

The public's constitutional right of access must extend to the preliminary hearing because it is an important component in the effective and fair administration of criminal justice to which the recognized societal and structural values embodied in public access apply.

B. Characterizing a Proceeding as "Accusatory" Phase or "Final" Adjudication Does Not Aid in Determining the Public's Constitutional Right of Access

Respondent, while not questioning the values of open judicial proceedings, raises the spectre of open grand jury proceedings and public access to the district attorney's office by characterizing the preliminary hearing as part of the "accusatory" phase as opposed to the adjudicatory phase of criminal prosecution. Respondent fails, however, to provide any historical, legal, or common definition of "accusatory." Respondent also fails to delineate where a criminal prosecution would change from accusatory to adjudicatory. Using the everyday meaning of accusatory, the entire prosecution remains accusatory up to the time, at the earliest, when the matter is submitted to the jury for a verdict. Indeed, the criminal prosecution remains accusatory until all appellate review has been exhausted.

Characterizing the preliminary hearing as an accusatory process — contended to be analogous to the grand jury — overlooks that it is a *judicial* proceeding. A determination by this Court that the values of open judicial proceedings apply to preliminary hearings would not inevitably lead, as claimed by respondent, to open grand jury proceedings or ready access to the district attorney's

investigations. The grand jury is, in California, an arm of the prosecution. *Hawkins v. Superior Court*, 22 Cal.3d 584, 586 P.2d 916, 150 Cal.Rptr. 435 (1978). The extent of the public's constitutional right of access to non-judicial, investigatory proceedings is clearly beyond the scope of the issues presented in this petition and cannot be used to deny the public a constitutional right of access to preliminary hearings.

Similarly, real party in interest's contention that the constitutional right of access should only extend to proceedings which involve a "final" adjudication is indefinite and confusing. Real party in interest characterizes proceedings such as the trial, hearings on motions to suppress evidence, demurrers, motions to dismiss, and motions for change of venue as proceedings involving this undefined "final" adjudication. If by "final" real party in interest means an end to the prosecution, he is clearly incorrect. While any one of these proceedings could in fact terminate the prosecution, the same is equally true of the preliminary hearing. One reason the right of access should not be limited to the trial is the fact that the criminal prosecution could in fact be terminated as a result of any one of these earlier judicial proceedings. Thus, characterizing proceedings on the basis of "finality" fails to aid in determining the public's constitutional right of access.

C. Deference To The State Court For The Resolution Of This Case Is Unwarranted

It is undisputed that this Court is the final arbiter of constitutional matters. Yet both respondent and real party in interest argue that this Court should defer to the state court's determination of the proper accommodation of United States Constitutional rights. This position is without support. Deference to a state's determination

cannot limit judicial inquiry when First Amendment rights are at stake. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978).

Real party in interest argues that the states are free to interpret their own state constitutional rights more expansively than federal constitutional rights. Even if this point were conceded, such state interpretation must be overruled should it violate United States Constitutional rights. *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980).

Further, deference to the state court's interpretation of its state's constitution is not an issue in this case. The California Supreme Court standard for closure was not based on any expansive interpretation of a state constitutional right. Rather, it was based on a misinterpretation of this Court's prior decisions and on the erroneous conclusion that the public has no First Amendment right of access to preliminary hearings. Accordingly, in setting the standard for closure under *Penal Code,* Section 868, the supreme court failed to give proper recognition to the public's constitutional right and, thus, allowed for closures in violation of that right.

Contrary to the suggestion of real party in interest, remand to the California Supreme Court is not warranted. Petitioner has not contended that *Penal Code,* Section 868 is unconstitutional. This statute clearly provides for open preliminary hearings except when necessary to close the proceeding in order to protect the defendant's Sixth Amendment right. Petitioner does contend that the California Supreme Court's interpretation of Section 868 is constitutionally impermissible.

Only this Court can determine the proper accommodation between the defendant's Sixth Amendment right and the public's First Amendment right. Once this Court

establishes the standard for accommodating these rights, the state cannot impose a slighter standard or a more stringent standard for closure. Thus, nothing further could be accomplished by remanding this case to the state court.[2]

D. Potential Pretrial Publicity Cannot be Used To Deny a Constitutional Right of Access

Both respondent and real party in interest argue that the dangers of pretrial publicity are reason enough for denying constitutional protection for the public's right of access to preliminary hearings.

But, as aptly illustrated in the brief of Amici Curiae *American Newspaper Publisher's Association, et al.,* pretrial publicity and its effect on the defendant's right to a fair trial is a non-concern in the vast majority of criminal cases. Even in cases of substantial pretrial publicity such as John DeLorean, John Hinkley, Claus Von Bulow, Dan White, Maurice Stans, John Connally, Angela Davis, Watergate and Abscam, there was no showing that adverse pretrial publicity in any way affected the jury's ability to render a fair and impartial verdict. As set forth more fully in amici's brief, studies have shown that, notwithstanding pretrial publicity, jurors are able to put aside information received prior to trial, as well as personal biases and prejudices, and render decisions based on the evidence presented at trial.

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[2]Both parties imply that because the states have a wide variety of criminal proceedings, this Court cannot arrive at a rule of general application in this case without interfering with the state's control over its criminal justice system. This position is untenable. An opinion from this Court establishing the public's First Amendment right of access to preliminary hearings does not impose upon the states an obligation to follow any procedure for criminal justice. Rather, it would require that the states recognize and protect the public's constitutional right of access.

As Amici ACLU, itself dedicated to the cause of personal liberties, points out, the alleged conflict between the public's First Amendment right and the defendant's Sixth Amendment right is overstated. A choice between these rights is unnecessary in an ovewhelming number of cases. In most instances, public access serves to *ensure* the defendant's right to a fair trial.

This Court's standard requiring a showing of an overriding interest and an absence of alternatives adequately accommodates those rare instances where pretrial publicity demonstratively will affect the defendant's Sixth Amendment right. There is, however, no adequate alternative for protecting the public's right of access and the values embodied in that right if judicial proceedings are closed.[3]

Using prejudicial pretrial publicity, which is of no concern in most cases, as a basis for denying the public a First Amendment right of access, points up the danger of using variables to establish a right. Rights must be determined on constants, not variables. In this case, the sole constant is that access to judicial proceedings furthers important societal and structural values already identified by this Court. Variables noted by respondent and real party in interest include pretrial publicity. In most cases this would not be a threat; in some it might. But the variables should be dealt with by issuing guidelines in applying constitutional rights exactly as this Court has done in *Press-Enterprise,* 464 U.S. 501; *Globe*

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[3]The transcript of the proceedings is not an adequate alternative to access to the proceeding in the first instance. *Gannett Co. v. DePasquale,* 443 U.S. 368, 441, n.17 (1979) (Blackman, J., concurring in part.)

Newspaper, 457 U.S. 596, and *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980). Using the possibility of harm or any other variable as a basis for denying a constitutional right of access would allow for unnecessary and easy closures, causing irreparable harm to the values underlying this right.

II

THE TRIAL COURT'S SUBSEQUENT RELEASE OF THE TRANSCRIPT CANNOT BE USED TO JUSTIFY THE INITIAL DEPRIVATION OF THE PUBLIC'S CONSTITUTIONAL RIGHTS OF ACCESS

Respondent attempts to use the trial court's later release of the transcript as justification for its initial action in refusing to unseal the transcript. Nothing in the trial court's subsequent action illustrates that the trial court recognized the public's constitutional right of access or considered any alternatives other than a complete ban on such access. The fact that the trial court ultimately released the transcript when defendant was unable to show even the slightest possibility of prejudice to his fair trial right does not mean its earlier action was constitutional. More importantly, the issue here is no longer the trial court's action but rather that of the supreme court's denial of a First Amendment right of access.

III

THE PUBLIC'S FIRST AMENDMENT RIGHT OF ACCESS EXTENDS TO JUDICIAL PROCEEDINGS WHERE ACCESS WOULD FURTHER THE STRUCTURAL AND SOCIETAL VALUES

Respondent and real party in interest acknowledge that access to judicial proceedings furthers societal and struc-

tural values. They acknowledge the propriety of constitutional protection for the right of access to various judicial proceedings. But neither can accept protection for access to preliminary hearings.

Respondent attempts to deny public access to the preliminary hearing by asserting, without support, that this proceeding is held exclusively for the benefit of the accused, that it is not intended to benefit the public. Real party in interest claims that only proceedings which involve a so-called but undefined "final" adjudication carry a constitutional right of access. Real party in interest even argues that a preliminary hearing may include portions which should be presumptively open and therefore it could be open and closed as necessary to accommodate the public's right of access. (Real party in interest's brief, p. 38, fn. 24.) Such a fragmented approach to the question of the right of access compels petitioner to reexamine the basic reasoning behind the constitutional right.

Open judicial proceedings are essential to the integrity of our judicial system. *Globe Newspaper,* 457 U.S. at 606. Openness helps to insure fairness and the appearance of fairness by acting as a check on all government officials and by insuring that all participants in the court proceeding perform their duties conscientiously and fairly. *Waller v. Georgia,* 467 U.S. 39. Additionally, open judicial proceedings serve to educate the public and lead to a more informed discussion of the functioning of our judicial system. *Globe Newspapers,* 457 U.S. at 604; *Richmond Newspapers,* 448 U.S. at 572.

These are constant values which this Court has recognized as the basis of the public's First Amendment right of access to judicial proceedings. Nothing in the nature of these values compels the conclusion that the public's First Amendment right is restricted to the trial which is

only one part of the criminal prosecution. Nothing in the nature of these values precludes a constitutional right of access to the preliminary hearing. If the public is precluded from evaluating this earlier stage of the criminal prosecution, a proceeding which vitally affects the trial phase, the public's right of access to the trial itself will have little meaning.

The criminal judicial process is less a pure adversarial contest than it is the test of the prosecution's case. Frequently the defense will offer little or no evidence at either the preliminary hearing or at the trial itself.[4] The real objective, in both instances, is to put the prosecution to its proof. The fact that this is the "moment of truth" for the prosecution is one of the compelling reasons for allowing the public access to the proceedings. There is no real difference under this rationale between the preliminary hearing and the evidence-taking portion of the trial itself. In both instances, the prosecution's evidence is being tested. Indeed, the need for public access to the preliminary hearing, is perhaps more significant since these judicial proceedings do not have the additional protection afforded by the presence of the jury. See, e.g., *Williams v. Florida,* 399 U.S. 78, 100 (1970) (quoting *Duncan v. Louisiana,* 391 U.S. 145, 159 (1968)).

Real party asserts that the public's concern for fairness can be adequately protected by the presence of the accused and counsel as well as the judicial tribunal. Real party contends that the public must depend upon the participants themselves for the proper and fair administration of justice at all times prior to the trial. This proposition shows a gross misunderstanding of human

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[4]In fact it is not uncommon for the "trial" to consist solely of the preliminary hearing transcript. California Department of Justice, Bureau of Criminal Statistics, 1978.

nature, of the intimidation caused by authority exercised under cover, and of the way people perceive that assurances of fairness are not a sham. Worse, it fails to understand or follow the clear reasoning of this Court in several cases in its recognition of a First Amendment right of access. "[T]he sure knowledge that anyone is free to attend gives assurances that established procedures are being followed and that deviations will become known." *Press-Enterprise,* 464 U.S. at 508.

Without constitutional protection for the public's right of access, the recognized values of access are in jeopardy. When California became a state, its first laws did not provide for closure of preliminary hearings. The second session of the Legislature then established closure at the simple request of the defendant. In 1983, the Legislature gave Californians a right of access which the supreme court limited by allowing for closure if there was a reasonable likelihood of substantial prejudice. Unless this Court pronounces a constitutional right, the state is free to change yet again and eliminate or further circumscribe the public's right. The values of access are far too important to be subject to such inconsistent treatment.

CONCLUSION

Petitioner seeks recognition by this Court that when the values of openness attach to a judicial proceeding, so must the constitutional right of access. Specifically, petitioner seeks to establish a constitutional right of access to preliminary hearings.

Respectfully submitted,

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I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 19, 1986, I served the within Reply Brief of Petitioner in re: "The Press-Enterprise Co. v. The Superior Court of the State of California" for County of Riverside in the United States Supreme Court, October Term 1985, No. 84-1560;

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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 19, 1986, at Los Angeles, California

Ce Ce Medina

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(6)

No. 84-1560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, A CALIFORNIA CORPORATION,
Petitioner,

—v—

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Complainant,

—v—

ROBERT RUBANE DIAZ,
Defendant.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS *AMICI CURIAE*

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INTEREST OF AMICI*

For sixty-five years the American Civil Liberties Union and its state affiliates, including amicus American Civil Liberties Union of Southern California, have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied in the Bill of Rights.

The present case raises issues of particular interest to the ACLU and ACLU of Southern California because it involves an apparent, although we believe misconceived, clash between two fundamental civil liberties. On the one hand, the ACLU and ACLU of Southern California have long asserted the paramount importance of a free press. Thus, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976),

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*/ Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

the ACLU participated as amicus curiae urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding. On the other hand, the ACLU and ACLU of Southern California have long supported the right of every criminal defendant to a fair trial before an impartial tribunal. The ACLU therefore joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a fair trial by prejudicial publicity.

This historic commitment to both sides of the "free press - fair trial" debate led the ACLU to participate as amicus curiae in several subsequent cases involving these issues including Gannett v. DePasquale, 443 U.S. 308 (1979); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); and Waller v. Georgia, 104 S. Ct. 2210 (1984), and place amici in a unique position to aid the Court in resolving this debate.

STATEMENT OF THE CASE AND POSITION OF AMICI

On December 23, 1981, Robert Rubane Diaz was charged with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. On July 6, 1982 the preliminary hearing commenced in the Riverside Municipal Court. The Court granted defendant's motion to exclude the public and press from the hearing pursuant to California Penal Code Section 868. The preliminary hearing was held over a period of 41 days and Diaz was held to answer on all charges. The Court sealed all transcripts of that extended hearing.

About seven months later the prosecutor and petitioner sought to have the transcripts released to the public. Defendant opposed this motion, claiming that release of the transcripts would result in publicity that would prejudice his right to a fair trial. On February 10, 1983, the Riverside Superior Court found that while

the material contained in the transcript was not "inflammatory" or "exciting," there was "a reasonable likelihood that unsealing all or any part of the transcript open might prejudice the defendant's right to a fair and impartial trial," and denied the request to unseal the transcripts (Joint Appendix, page 60). On appeal, this order was affirmed by the California Supreme Court which held that the First Amendment access right does not extend to preliminary hearings. Press-Enterprise v. Superior Court, 37 Cal. 3d 772, 691 P.2d 1026, 209 Cal. Rptr. 360 (1984).

SUMMARY OF ARGUMENT

Amici respectfully submit that:

The right of access to judicial proceedings extends to preliminary hearings which are an important part of the adjudication of criminal charges. Closed judicial hearings are flatly inconsistent with our constitutional tradition and

ultimately undermine the interests of criminal defendants. Openness supports and preserves the integrity of our judicial system, ensures fairness in criminal proceedings, and thereby serves the interests of the public, of the prosecution, and of criminal defendants.

Public proceedings play a vital structural role in our system of justice and work for the benefit of all participants by letting the public see that justice is being done. This structural value of promoting fairness is as important and applicable in preliminary hearings, as in criminal trials, voir dire proceedings, and pretrial suppression hearings - all of which this Court has held must be open. Moreover, the values served by openness accrue to the benefit of criminal defendants and society regardless of who seeks to secure openness.

Closure is an extraordinary step which should only be used sparingly, and then only

when there are specific findings that closure is essential and that closure is narrowly tailored to serve those interests. By failing to recognize the constitutional right of access to preliminary hearings and by allowing closure as a matter of right, the California Supreme Court has significantly eroded the right of open judicial proceedings enunciated by this Court. Accordingly, the judgment below should be reversed.

ARGUMENT

A. Openness Supports And Preserves The Integrity Of Our Judicial System And Improves The Quality Of Judicial Proceedings Thereby Aiding The Interests Of Both Society And Criminal Defendants

The openness of judicial proceedings is an essential quality of our system of law and an integral facet of American society. Whether openness is based upon the Sixth

Amendment right of the accused to a public trial, Waller v. Georgia, 104 S. Ct. 2210 (1984); Sheppard v. Maxwell, 384 U.S. 333 (1966), or the First Amendment right of public access, Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), it serves values important to society, criminal defendants, and prosecutors.

Although most of the recent case law on the value of public trials has been based on the First Amendment, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Waller v. Georgia, 104 S. Ct. at 2215.

The right of access to criminal proceedings plays a significant structural role in the functioning of the entire judicial process. Access allows "the public

to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government." Globe Newspapers, 457 U.S. at 606; Richmond Newspapers, 448 U.S. at 587 (Brennan, J., concurring).

This structural role of openness flows from the central value served by open criminal proceedings -- the promotion of fairness -- and satisfies vital First and Sixth Amendment policies. As the Court recently emphasized, "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and society as a whole." Globe Newspaper, 457 U.S. at 606 (footnote omitted, emphasis added).

In an open society, public trials are one of the important protections of the rights of an accused since only through knowledge about such proceedings can the

public ensure that defendants are fairly treated. Gannett, 443 U.S. at 380. Indeed, it is a function of a free press to ensure fairness to the defendant by reporting on judicial proceedings and thereby scrutinizing the administration of justice. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

The right to a public trial promotes fairness because it "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution" and works as "an effective restraint on possible abuse of judicial power." In Re Oliver, 333 U.S. 257, 270 (1948). This Court has repeatedly stated that public scrutiny of the functioning of courts is an effective means of assuring that judges, prosecutors, and defense attorneys perform responsibly and not arbitrarily. Sheppard v. Maxwell, 384 U.S. at 350; Cox Broadcasting Corp. v. Cohn, 420

U.S. at 492. Thus, public trials serve essentially the same function for the public, for the prosecution, and for defendants: they guard against the abuses and excesses typical of secret judicial proceedings. Secret trials have rightly been called a "menace to liberty" and have rightly been condemned because of the abuses and excesses of the Spanish Inquisition's and the English Court of Star Chamber's secret proceedings. In Re Oliver, 333 U.S. at 268-69. Not surprisingly then, openness is an "indispensible attribute of an Anglo-American trial." Richmond Newspapers, 448 U.S. at 569.

Openness furthers a number of other important goals in judicial proceedings. Openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise, 464 U.S. at 508; Richmond Newspapers, 448 U.S. at 569-71.

It also helps to improve the quality of testimony, induces unknown witnesses to come forward with testimony, and discourages perjury. Gannett, 443 U.S. at 383; Richmond Newspapers, 448 U.S. at 569; Press- Enterprise, 464 U.S. at 108; Waller,104 S. Ct. at 2215.

Openness also has what is sometimes referred to as a "community therapeutic value." Press-Enterprise, 464 U.S. at 508; Richmond Newspapers, 448 U.S. at 571. Open proceedings provide an outlet for the public's concerns and emotions which result from criminal acts. Part of this community need may stem from an "urge for retribution." Richmond Newspaper, 448 U.S. at 571. The public also has a strong need to see instances of police or prosecutorial misconduct revealed and to be assured that the criminal justice system is functioning fairly. As the Court noted in Richmond

Newspapers, 448 U.S. at 571,/1/ "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge. . . ." Proceedings held in public vindicate the concerns of the victims of crime, the community, and defendants in knowing that the criminal system operates fairly and justly. Press-Enterprise, 464 U.S. at 509; Richmond Newspapers, 448 U.S. at 571-72.

B. The Values Secured By Openness In Criminal Trials Apply With Equal Force To Preliminary Hearings

The values ensured by access to criminal "trials" are also vitally important to the proper functioning of other criminal proceedings such as pretrial suppression

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1/ Quoting Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U. Pa. L. Rev. 1, 6 (1961).

hearings, Waller, 104 S. Ct. 2210, and voir dire proceedings (whether or not they are deemed to be a part of the trial). Press-Enterprise, 464 U.S. 501. As this Court recognized in Waller and Press-Enterprise, both suppression and jury selection proceedings occupy important roles in our criminal justice system.

This Court, therefore, has upheld a constitutional right of access to suppression hearings because the aims and interests protected by the accused's rights to public trial "are no less pressing in a hearing to suppress wrongfully seized evidence. . . . [which often is] as important as the trial itself. . . . In Gannett, as in many cases, the suppression hearing was the only trial, because the defendants thereafter pleaded guilty

pursuant to a plea bargain." Waller, 104 S. Ct. at 2215-16./2/

Similarly, preliminary hearings occupy a vital role in the functioning of California's criminal justice system. Preliminary hearings contain many of the same procedural attributes and safeguards as trials and often function as the sole hearing of a case on its merits in California./3/ In a very real sense, then, preliminary hearings

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2/ In Waller, the Court focused on the structural role of openness in extending the right of access to suppression hearings. The Court did not look to either the history of suppression hearings or the issue of whether they constituted part of the "trial" within the meaning of the Sixth Amendment. The Court was apparently extending Justice Steven's observation, that "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues," Press-Enterprise, 464 U.S. at 516 (Stevens, J., concurring), to the Sixth Amendment.

3/ We understand that other Amici are undertaking an extensive analysis of the procedural and functional similarity of preliminary hearings to trials in California. We will not duplicate that effort here.

"implicate all the policies that require that the trial be open to the public." Gannett, 443 U.S. at 436 (Blackman, J., concurring in part and dissenting in part); id. at 397 n.1 (Powell, J., concurring). Openness will promote fairness in preliminary hearings, encourage witnesses to come forward, discourage perjury, satisfy the community's cathartic needs, and, perhaps most importantly at this stage of the proceeding, act as a check upon the potential abuse of prosecutorial and judicial power. If the public is not allowed to see how preliminary hearings operate, then we cannot expect the public to exert any pressure to prevent the abuse of and for the improvement of such proceedings.

Because the values served by openness apply with equal force to preliminary hearings in California, it is in the interest of all parties, including criminal

defendants, to maintain strict standards for closure of such proceedings.

C. The Values That Openness Secure Apply Regardless Of Who Insists Upon Open Proceedings

The "fair trial - free press" debate has been framed in terms of a direct conflict between these two rights. The dilemma posed by this formulation was observed long ago by Justice Black: "If the inference of conflict raised by the last clause be correct [stating that the liberty of expression should be subordinated to the interest in judicial impartiality], the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherisned policies of our civilization, and it would be a trying task to choose between them." Bridges v. California, 314 U.S. 252, 260 (1941).

Amici, a staunch defender of both rights, believes that a choice between them

is unnecessary in the overwhelming majority of cases. "I would reject the notion that a choice [between free speech and fair trials] is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other." Nebraska Press Ass'n v. Stuart, 427 U.S. at 611-12 (1976) (Brennan, J., concurring in judgment).

The conflict between these two fundamental rights is simply overstated. Openness in judicial proceedings serves interests common to both the public and defendants -- the promotion of fairness in our judicial system. Chief Justice Burger recently made this point clearly: "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes

fairness." Press-Enterprise, 464 U.S. at 508.

In the overwhelming majority of criminal proceedings, openness poses no serious threat of prejudice to defendants, and, in fact, helps to promote fair trials. It is misleading to view this issue in terms of the rights of the press versus the rights of defendants. Assuredly there may be instances in which First and Sixth Amendment interests clash. In those extremely rare instances, closure may be justified, but "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enterprise, 464 U.S. at 510; Waller, 104 S. Ct. at 2216.

The California Supreme Court has determined that closure of preliminary hearings is justified upon a finding of only a "reasonable likelihood of substantial prejudice." By allowing closure on such a general basis, without more, California has adopted an unconstitutional standard,/4/ and undermined the values of open proceedings, which apply both to the public and defendants.

The ease with which the standard enumerated by the California Supreme Court can be met - the trial court's simple incantation of the words "reasonable

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4/ The California Supreme Court did not require the trial court to consider alternatives to closure, Waller, 104 S. Ct. at 2217; Press Enterprise, 464 U.S. at 501; to consider closing only those parts of the hearing or sealing those parts of the transcript which might lead to prejudice, Waller, 104 S. Ct. at 2217; Press Enterprise, 404 U.S. at 501; and most basically failed to require articulated findings showing that the defendant's fair trial interests were truly threatened. Press-Enterprise, 464 U.S. at 510-11.

likelihood of substantial prejudice" - seriously undermines the continued existence of open preliminary hearings and threatens to erode the right of access to all adjudicatory proceedings. The need for openness - the promotion of fairness in our judicial system - is the same regardless of who seeks to ensure public proceedings. Given the great benefits of openness, no one - prosecutor or criminal defendant - should be allowed to obtlain closure merely by requesting it, which is precisely what happened below.

CONCLUSION

For all the foregoing reasons, the decision of the California Supreme Court in this case should be reversed.

Respectfully submitted,

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November 29, 1985

No. 84-1560

(7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PRESS-ENTERPRISE COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY,

Respondent.

On Writ of Certiorari to The Supreme Court of California

BRIEF *AMICI CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; AMERICAN BROADCASTING COMPANIES, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CBS INC.; CHICAGO TRIBUNE COMPANY; CHRONICLE PUBLISHING CO.; THE CONCORD MONITOR; DOW JONES & CO., INC.; GANNETT CO., INC.; GLOBE NEWSPAPER COMPANY; THE HEARST CORPORATION; THE MIAMI HERALD PUBLISHING CO.; MINNEAPOLIS STAR AND TRIBUNE COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL NEWSPAPER ASSOCIATION; NATIONAL PUBLIC RADIO; THE PHILADELPHIA INQUIRER; PHOENIX NEWSPAPERS, INC.; PUBLIC BROADCASTING SERVICE; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; RICHMOND NEWSPAPERS, INC.; SCRIPPS HOWARD; SEATTLE TIMES COMPANY; AND THE WASHINGTON POST.

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IN THE

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OCTOBER TERM, 1985

No. 84-1560

PRESS-ENTERPRISE COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY,

Respondent.

On Writ of Certiorari to The Supreme Court of California

Brief *Amici Curiae* of American Newspaper Publishers Association; The Society of Professional Journalists, Sigma Delta Chi; American Broadcasting Companies, Inc.; American Society of Newspaper Editors; CBS Inc.; Chicago Tribune Company; Chronicle Publishing Co.; The Concord Monitor; Dow Jones & Co., Inc.; Gannett Co., Inc.; Globe Newspaper Company; The Hearst Corporation; The Miami Herald Publishing Co.; Minneapolis Star and Tribune Company; National Association of Broadcasters; National Newspaper Association; National Public Radio; The Philadelphia Inquirer; Phoenix Newspapers, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; Reporters Committee for Freedom of the Press; Richmond Newspapers, Inc.; Scripps Howard; Seattle Times Company; and The Washington Post.

INTEREST OF THE AMICI CURIAE

In this second case involving the *Riverside Press-Enterprise* to come before this Court in the last three terms, the California courts have ruled that a trial judge properly conducted more than forty days of pretrial hearings in a multiple-murder prosecution behind closed doors. *Amici curiae* and their members are publishers, broadcasters, editors, reporters and photographers working throughout the United States. *See* Appendix *infra*. *Amici* are keenly aware that instead of acquiring information about criminal proceedings "by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (Burger, C.J. announcing judgment). Thus, *amici* and their members possess a deep and abiding interest in ensuring that the public's right of access to judicial proceedings in criminal cases, a right guaranteed by the First Amendment, is not compromised, as it has been in this case.

SUMMARY OF ARGUMENT

Three times since 1980, this Court has held that the First Amendment affords the press and public a right of access to judicial proceedings in criminal cases. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The right of access emanates both from our tradition of open judicial proceedings in criminal cases and from the vital role of public proceedings in maintaining the integrity of the judicial process and our system of self-government. *Id.* at 569.

The decision of the trial court in this case to close every minute of a forty-one day preliminary hearing in a capital case and seal the transcript of that secret proceeding violates the First Amendment. Throughout Anglo-American history, when criminal proceedings have matured from the investigative or inquisitorial stage to become part of the judicial process, they have consistently been conducted in public. From the open-air meetings of pre-Norman England through the

preliminary hearing presided over by Chief Justice Marshall during the prosecution of Aaron Burr for treason, our heritage bespeaks an unbroken tradition of open judicial proceedings in criminal cases.

Indeed, whether a judicial officer is called upon to render an adjudication during the course of a criminal trial or in any of a myriad of pretrial settings, public access to those proceedings serves an imposing array of structural values. Open proceedings provide a fundamental safeguard that restrains the abuse of power by public officials, checks corrupt practices, and protects the rights of the accused. Moreover, public access ensures the citizenry a free flow of information about the criminal justice system and facilitates informed debate about public affairs. In contemporary America, the criminal justice process has become, for all practical purposes, a pretrial process. In an era when more than ninety percent of criminal cases are disposed of prior to trial, the public must have access to pretrial proceedings, or else it will lose confidence in the system of dispensing criminal justice itself. To deny the press and public access to those judicial proceedings in which the fate of the accused is typically determined will serve only to diminish the reservoir of public confidence enjoyed by the judiciary for more than two centuries.

Accordingly, *amici* urge this Court to hold that closure of *any* judicial proceeding in a criminal case is constitutionally impermissible unless, following a hearing and findings articulated in the record, the trial court finds that (1) open proceedings would create a clear and present danger to the fairness of the trial; (2) no less restrictive alternatives to closure are available; and (3) closure will effectively protect the accused's right to a fair trial. If such a standard is properly applied, closure should rarely, if ever, become necessary, especially since pretrial publicity, even intense publicity, poses a realistic threat to a fair trial in only the most extraordinary circumstances. In the instant case, the trial court, as well as the California appellate courts, erroneously presumed that publicity, in and of itself, is an evil to be avoided, and consequently ordered closure of a preliminary hearing without making the requisite findings.

That order is constitutionally impermissible and must be reversed.

ARGUMENT

I. THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS IN CRIMINAL CASES.

A. The First Amendment Grants The Press And Public A Right Of Access To Criminal Proceedings.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court declared for the first time that the First Amendment guarantees both the press and public a right of access to judicial proceedings in criminal cases. This self-proclaimed "watershed" ruling, *id.* at 582 (Stevens, J., concurring), stands for the ineluctable proposition that the courtroom "is a public place where the people generally — and representatives of the media — have a right to be present." *Id.* at 578 (Burger, C.J., announcing judgment).

In the instant case, the trial court's order closing a preliminary hearing and prohibiting release of the hearing transcript violates the First Amendment right of access to judicial proceedings. By summarily closing the courtroom, the trial court failed to recognize that the twin principles underlying this Court's previous decisions defining the right to attend criminal proceedings apply with equal force to the preliminary hearing and other adjudicatory pretrial proceedings: (1) judicial proceedings — whether trial or pretrial — "historically [have] been open to the press and general public," and (2) access to such proceedings "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982).

B. Judicial Proceedings In Criminal Cases Have Traditionally Been Conducted In Open Court.

From *Richmond Newspapers* through *Press-Enterprise I*, this Court has looked to the judgment of history for assistance in ascertaining the scope of the First Amendment right of

access to the criminal justice process. Indeed, the Court has repeatedly asserted that the right of access to judicial proceedings draws its essence from its common law heritage, not only "'because the Constitution carries the gloss of history,'" but, more particularly, because the "'tradition of accessibility implies the favorable judgment of experience.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 603 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)).[1] Thus, in *Richmond Newspapers* itself, the Court reviewed the historical record, dating from the adoption of the First Amendment and earlier, and concluded that public access "has long been recognized as an indispensable attribute of an Anglo-American trial." 448 U.S. at 569 (Burger, C.J., announcing judgment). Similarly, in *Press-Enterprise I*, Chief Justice Burger, writing for the Court,[2] recognized that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process." 464 U.S. at 505.

The lessons of history reveal that, beyond the criminal trial and *voir dire*, the presumption of public access has long been an "indispensable attribute" of virtually all *judicial* proceedings

[1]The relevance of history in ascertaining the scope of the *First Amendment* right of access to criminal proceedings is, therefore, markedly different from the historical analysis undertaken in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), in order to determine whether the *Sixth Amendment* affords third parties, in addition to the accused, the right to a "public trial." In the First Amendment context, this Court has looked to history as a means of discerning a "'tradition of accessibility,'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)), which, in turn, bespeaks a "presumption of openness," 448 U.S. at 573 (Burger, C. J., announcing judgment). The historical inquiry in *Gannett*, however, was designed to discern the intent of the Framers of the Sixth Amendment with respect to the quite different issue of whether they viewed that provision as granting substantive rights to the public, as well as to the accused. *See* 443 U.S. at 385.

[2]Eight justices joined in the Chief Justice's opinion. Justice Marshall concurred in the result. *See* 464 U.S. at 520 (Marshall, J., concurring in result).

in which the accused or his counsel appears before a "neutral and detached" judicial officer. *See Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). Throughout Anglo-American history, while certain inquisitorial functions of police and prosecutors have traditionally been performed in secret, judicial proceedings have consistently been conducted in public. For centuries, the only portion of the criminal justice process characterized by the presence of an impartial, judicial decisionmaker was the trial itself. As recognized in *Richmond Newspapers* and *Press-Enterprise I*, these trials were also characterized by a tradition of public access. *See* 448 U.S. at 564-67; 464 U.S. at 505. From the "open-air meetings" of pre-Norman England, F. Pollock, The Expansion of the Common Law 140 (1904), to the "embarrassingly large and unwieldy" public trials of the twelfth through fourteenth centuries, Wells, *The Origin of the Petty Jury*, 27 L.Q. Rev. 347, 356 (1911), "court day" was "one of the great rivals of the fair or pageant in the attracting of crowds," E. Jenks, The Book of English Law 25 (6th ed. 1967). Even after the jury itself gradually mutated from a body of witnesses to an impartial trier of facts, the entire proceeding was, "[b]y immemorial usage," held "in open court, to which spectators were admitted." 2 J. Bishop, New Criminal Procedure § 957 (2d ed. 1913).

Over time, the criminal justice process at common law came to include components other than the trial itself, components designed primarily to enable the Crown to undertake investigations of criminal conduct. In the sixteenth century, for example, Parliament enacted the Statutes of Philip and Mary, which created the office of magistrate. *See* 1 & 2 Phil. & M., ch. 13. Prior to the passage of the Statutes in 1554 and 1555, criminal indictments were regarded as simply commencing "a piece of litigation between the crown and the accused," and proceedings were the same as in a civil action. 5 W. Holdsworth, A History of English Law 176 (2d ed. 1937).[3] The

[3]*Accord* 2 F. Pollock & F. Maitland, The History of English Law 582-83 (2d ed. 1899). Under the thirteenth century law of arrest, felons were summarily arrested and jailed. "[A]ny preliminary magisterial investigation, such as that which is now-a-days conducted by our justices of the peace, is still in the remote future." *Id.*

Statutes, however, dramatically transformed the criminal law by empowering the magistrate, who served as a combination police officer and public prosecutor, to investigate crimes and bring formal charges against the accused on behalf of the Crown.[4] The magistrate was authorized to undertake interrogations of suspects and witnesses in order to determine whether to commence a criminal prosecution. *See* 1 & 2 Phil. & M., ch. 13, § 4; 2 & 3 Phil. & M., ch. 10, § 2. Although these investigations were often referred to as "preliminary hearings" in their day, they were decidedly inquisitorial proceedings and formed no part of the *judicial* process, which continued to commence with the trial itself. Not surprisingly, in addition to the absence of a judicial officer, proceedings before the magistrate lacked all other trappings of a judicial hearing as well; not only was the magistrate an agent of the Crown, but the accused had no right to counsel, and was not permitted to call or cross-examine witnesses. *See* 5 W. Holdsworth, *supra*, at 192.[5]

The investigatory and inquisitorial function of the magistrate is vividly illustrated in *The Trial of Colonel Turner*, 6 Har. St. Tr. 565 (O.B. 1664). The case involved a robbery and the magistrate was the first witness called at trial. He testified that

[4]Enactment of the Statutes of Philip and Mary was precipitated by the lawlessness of the fifteenth century. In most respects, the Statutes reflect the influence of the law of the Continent, which employed the inquisitorial proceeding as a means of repressing crime. *See* 5 W. Holdsworth, A History of English Law 169-77 (2d ed. 1937). The salient features of the Continental procedure were "secrecy, torture, and restricted opportunities of defense." *Id.* at 174.

[5]Since these so-called "preliminary hearings" in England can in no sense be characterized as judicial proceedings, the fact that "[u]nder English common law, the public had no right to attend" them, *Gannett Co. v. DePasquale*, 443 U.S. at 389; *see id.* at 394-95 (Burger, C.J., concurring), is of little, if any, relevance to the tradition of public access to judicial proceedings. Indeed, to the extent that most modern pretrial proceedings, which were largely unknown at common law, can be compared to the English experience, the appropriate analogy is to the criminal trial itself. For example, "the modern suppression hearing . . . is a type of objection to evidence such as took place at common law, and as takes place today in the case of non-constitutional objections, in *open court* during trial." *Id.* at 437 (Blackmun, J., concurring in part) (emphasis in original).

he was called to the scene of the crime, where the victim "put me upon the business to examine it." *Id.* at 572. The magistrate then interrogated the victim's two servants and proceeded to the home of the suspect, Colonel Turner:

> I called him in, but he denied it; but not as a person of his spirit, which gave me some cause of further suspicion. I desired to search his house; nay, told him I would whether he would or no.

Id. The next day, after receiving a tip from an informant, the magistrate apprehended Colonel Turner, elicited a confession, and sent him to jail. *Id.* at 573-76. Such investigative activity was commonplace for magistrates in the seventeenth century — they served, for all practical purposes, as the precursor of the modern day policeman.[6]

Since the function of the magistrate at common law was to gather evidence and, ultimately, bring formal charges against the accused, he conducted his investigations in secret.[7] In this manner, the accused was denied access to the evidence against him, which was communicated by the magistrate only to his colleague, the prosecutor. *See* 5 W. Holdsworth, *supra*, at 191. In short, the secrecy inherent in these so-called "preliminary hearings" was designed to keep the accused ignorant of the prosecution's case *prior to* the commencement of the judicial process. By excluding the public as well as the prisoner from these inquisitorial proceedings, the risk that details of the Crown's case would be leaked to the accused was minimized.

[6]*See, e.g.*, *The Trial of Count Coningsmark*, 9 Har. St. Tr. 1 (O.B. 1682) (magistrate searched several houses for murder suspects and upon their arrest took them to his home for examination); *The Trial of George Busby*, 8 Har. St. Tr. 525 (Assizes 1681) (magistrate broke down doors of house and conducted search throughout the night until suspect, a "Romish Priest," was found).

[7]*See* 1 J. Stephen, A History of the Criminal Law of England 225 (1883) ("I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial.").

Once the magistrate determined to bring charges, however, the accused was bound over for a *public* trial before an impartial judge and jury. *See* T. Smith, De Republica Anglorum 85-98 (1583) (Alston ed. 1806).

Prior to the American Revolution, the administration of justice in the colonies generally followed the prescriptions of the Statutes of Philip and Mary.[8] Even after the war for independence, some courts continued to conduct inquisitorial proceedings based on the English model.[9] Yet, soon after the promulgation of the Bill of Rights, preliminary hearings in the United States acquired judicial characteristics. In fact, the Fifth Amendment privilege against self-incrimination itself provided the impetus for the abolition of magisterial interrogation. *See* Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1236 (1932). In its place, the new nation developed a bifurcated system of law enforcement in which the inquisitorial and judicial functions became more clearly distinct and independent than they had been in England. The magistrate's inquisitorial and prosecutorial powers were usurped at an early stage by "the county prosecutor as an aggressive agent of law enforcement, and [by] the power and prestige of the sheriff in all frontier communities." R. Moley, Our Criminal Courts 20 (1930). Conversely, even before the development of the modern police force, "[t]he idea of separation of powers, so much insisted on in the American polity, made [pretrial proceedings] *judicial*, with all the constitutional safeguards attaching to a judicial proceeding." R. Pound, Criminal Justice in America 88 (1930) (emphasis added). In short, the magistrate became a judge, who was called upon to render, in the pretrial setting, a detached and independent judgment in matters brought before him. Significantly, as the magistrate evolved into a judicial officer who presided at proceedings held prior to the trial itself,

[8]*See, e.g.*, J. Goebel & T. Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure 1664-1776, at 340-41 (1944).

[9]*See, e.g., United States v. White*, 28 F. Cas. 588 (C.C.D. Pa. 1807) (No. 16,685).

those proceedings became decidedly "public affair[s]" in most American jurisdictions. Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. L. Rev. 397, 407 (1961). Indeed, in the few American jurisdictions in which the court retained authority to close pretrial proceedings to the public, it is clear that the power remained "in judicial dormancy and day-to-day disuse." *Id.*[10]

Perhaps the most celebrated instance of an early pretrial hearing in this country occurred in 1807 when the United States sought to prosecute Aaron Burr for treason. *See United States v. Burr*, 25 F. Cas. 1 (C.C.D. Va. 1807) (No. 14,692). A judicial hearing was convened by Chief Justice Marshall, who also sat as the trial judge, to determine whether probable cause existed to charge Burr with treason. *Id.* at 12 (No. 14,692a). The court reporter gave the following account:

> At ten o'clock MARSHALL, Chief Justice, took his seat on the bench, in the court room, which was densely filled with citizens. . . . On the suggestion of counsel that it would be impossible to accommodate the spectators in the court room, the chief justice adjourned to the hall of the house of delegates.

Id. at 11. As the hearing progressed, counsel for both sides presented argument, and the accused gave testimony. The following day, the Chief Justice ruled that the prosecution's evidence merely showed probable cause that Burr was guilty of the lesser crime of "carrying on a military expedition against a nation with whom the United States were at peace." *Id.* at 15.

Undaunted, the prosecution returned two months later with additional evidence and once again moved the court to charge Burr with treason. *See United States v. Burr*, 25 F. Cas. 25 (C.C.D. Va. 1807) (No. 14,692b). Because a grand jury had

[10]Even the existence of a statutory mechanism authorizing closure was limited in this country to "a numerically small bloc of states which early adopted a unique provision of the Field Code." Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. L. Rev. 397, 407 (1961) (citing Commissioners on Practice and Pleadings, New York Code of Criminal Procedure, 4th Rep. § 195 (1849)).

been empanelled to consider the first charge, however, defense counsel opposed holding a second probable cause hearing based on the newly discovered evidence. In his view,

> a public examination of the evidence the district attorney might see fit to bring forward against Col. Burr would have a tendency to increase the prejudice already existing in the public mind against him, and in spite of all precautions this testimony would reach the ears of the grand jury.

Id. at 26. It is plain from defense counsel's concerns that, under normal circumstances, the preliminary hearing would be open to the public. Recognizing "that the result of this motion may be publications unfavorable to the justice and to the right decision of the case," the Chief Justice nevertheless refused to deny the prosecution the right to another preliminary hearing. *Id.* at 27. He did not even consider closing the hearing to protect Burr from unfair prejudice.

The American evolution of pretrial proceedings from magisterial inquisitions shrouded in secrecy to public hearings presided over by a neutral, judicial officer was duplicated shortly thereafter in England as well. In fact, by the mid-nineteenth century, the public character of the English preliminary hearing became one of its most celebrated features.[11] This transformation of pretrial proceedings in Britain occurred through the combined impact of a series of legislative reforms. By 1839, a modern police force, independent from the control of the magistrates, was firmly established, and by 1848 the accused was afforded a privilege against self-incrimination and a

[11]In his description of English criminal procedure after 1650, Pollock explains:

> The secret inquisitorial proceeding has become open and judicial; there is no longer an examination of the prisoner, but a preliminary trial in court, the police-court, which in modern times is to many citizens the only visible and understood symbol of law and justice. The magistrate's office is more public than ever; the feeling that justice should be done in the light of day has been strong enough to reassert itself after a partial eclipse.

F. Pollock, The Expansion of the Common Law 31(1904).

full panoply of confrontational rights during the preliminary hearing.[12] And, although the magistrate, now a judicial officer, theoretically retained authority to exclude the public from the preliminary hearing, *see* 11 & 12 Vict., ch. 42, § 19, "any use of this power of exclusion" quickly became "uncommon," F. Maitland, Justice and Police 129 (1972). Thus, in England as well as in the United States, pretrial *judicial* proceedings have, since their origins, been characterized by a presumption of openness and free public access.

In this country, it cannot be disputed that, in the more than 170 years from the *Burr* case through this Court's decision in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the closure of pretrial proceedings in criminal cases was a virtually unheard of phenomenon, *see id.* at 432 n. 11 (Blackmun, J., concurring in part) ("only the New York courts in this case, and perhaps some isolated others, have departed from this tradition [of open judicial proceedings] in criminal cases"); *In re Oliver*, 333 U.S. 257, 272 n.29 (1948) (no court has excluded press and public from criminal proceedings). Indeed, the "near uniform practice in the federal and state court systems has been to conduct pretrial criminal proceedings in open court." *State v. Williams*, 93 N.J. 39, 55, 459 A.2d 641, 649 (1983).[13] According-

[12]In 1829, the Metropolitan Police Act of Peel was enacted, and first differentiated the functions of magistrate and policeman. *See* 10 Geo. 4, ch. 44 (1829). By 1839, all control over the police had been transferred from the magistrates to police commissioners. R. Moley, Our Criminal Courts 19 (1930). The Prisoners' Counsel Act, 6 & 7 Will. 4, ch. 114 (1836), permitted all accused persons to inspect depositions to be used against them. *See* 1 W. Holdsworth, *supra* note 4, at 297. Finally, the Indictable Offences Act, 11 & 12 Vict., ch. 42 (1848), precluded the magistrate from examining the accused, although the accused was permitted to make a statement. Moreover, the accused was granted the right to call witnesses and to cross-examine the prosecution's witnesses. *Id.; see* 1 J. Stephen, *supra* note 7, at 221.

[13]*See, e.g., Application of the Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982); *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971); *Arkansas Television Co. v. Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983); *Star J.*

ly, this Court should forthrightly declare that the tradition of openness that has always characterized judicial pretrial proceedings in the criminal justice process has earned "'the favorable judgment of experience,'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 605 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 589 (Brennan, J., concurring in judgment)), and has created a presumptive right of public access under the First Amendment.

C. Access To Judicial Proceedings By The Press And Public Promotes The Integrity Of The Criminal Justice Process And Our System Of Self-Government.

The criminal justice system in this country has overwhelmingly become a pretrial process. "Indeed, most criminal

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Publishing Corp. v. County Court, 197 Colo. 234, 591 P.2d 1028 (1979); *State v. Burak*, 38 Conn. Supp. 627, 431 A.2d 1246 (Super. 1981); *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982); *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982); *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982); *Gannett Pacific Corp. v. Richardson*, 59 Hawaii 224, 580 P.2d 49 (1978); *State v. Porter Superior Court*, 274 Ind. 408, 412 N.E.2d 748 (1980); *Ashland Publishing Co. v. Asbury*, 612 S.W.2d 749 (Ky. App. 1980); *Buzbee v. Journal Newspapers, Inc.*, 297 Md. 68, 465 A.2d 426 (1983); *Minneapolis Star & Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983); *State ex rel. Smith v. District Court*, 654 P.2d 982 (Mont. 1982); *Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 406 A.2d 137 (1979); *State v. Williams*, 93 N.J. 39, 459 A.2d 641 (1983); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, *cert. denied*, 449 U.S. 992 (1980); *Rapid City J. Co. v. Circuit Court*, 283 N.W.2d 563 (S.D. 1979); *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515 (Utah 1984); *Herald Ass'n v. Ellison*, 138 Vt. 529, 419 A.2d 323 (1980); *Richmond Newspapers, Inc. v. Virginia*, 222 Va. 574, 281 S.E.2d 915 (1981); *Federated Publications, Inc. v. Kurtz*, 94 Wash. 2d 51, 615 P.2d 440 (1980); *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544 (W. Va. 1980); *Williams v. Stafford*, 589 P.2d 322 (Wyo. 1979); Cal. Penal Code § 868 (West 1982); Mich. Stat. Ann. § 27A.1420 (Callaghan 1980); Wis. Stat. Ann. § 757.14 (West 1981); *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519 (1980); American Bar Ass'n, Standards Relating to the Administration of Justice, Fair Trial and Free Press, Standard 8-3.2 (2d ed. 1980).

prosecutions consist solely of pretrial procedures." *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 397 (1979) (Burger, C.J., concurring)). As judicial resources have become increasingly burdened and a panoply of procedural safeguards has been afforded criminal defendants, courts and counsel necessarily have become reliant on pretrial judicial proceedings for the fair and efficient dispensation of criminal justice. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 122 n.23 (1975); *State v. Williams*, 93 N.J. 39, 53-54, 459 A.2d 641, 648 (1983); C. Whitebread, Criminal Procedure § 21.01 (1980).

At least eighty-five percent— and perhaps as many as ninety-five percent— of all criminal cases are disposed of before trial. *Gannett Co. v. DePasquale*, 443 U.S. at 397 (Burger, C.J., concurring); C. Whitebread, *supra*, § 21.01; 1 W. LaFave & J. Israel, Criminal Procedure § 1.4 (1984); U.S. Department of Justice, The Prosecution of Felony Arrests, 1980, at 25 (1985). In many of these cases, "the pretrial hearing is the only adversary proceeding the accused will have in resolving his case." *United States v. Criden*, 675 F.2d at 557. Such proceedings may take many forms, among them suppression, preliminary, bail, due process, entrapment, competency and pretrial detention hearings. *See* Note, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 Emory L. J. 619 (1983).

This Court has recognized that pretrial hearings "often are as important as the trial itself." *Waller v. Georgia*, 104 S.Ct. 2210, 2215 (1984).[14] In *Coleman v. Alabama*, 399 U.S. 1, 8 (1970), for example, the Court asserted that a preliminary hearing held "to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury" may well prevent a defendant from being prosecuted at all. Even if a pretrial hearing is not determinative of the ultimate result of a criminal prosecution, the outcome of the hear-

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[14] In *Waller*, the Court noted that "in many cases, the suppression hearing was the *only* trial because the defendants thereafter pleaded guilty pursuant to a plea bargain." 104 S.Ct. at 2216.

ing still may have great significance to both the accused and the public generally. *See, e.g., Gerstein v. Pugh*, 420 U.S. at 114.

In view of the substantial role played by pretrial judicial proceedings in the criminal justice system, it follows that "[t]he principles that support a right of access to trials apply with equal force to pretrial proceedings." *United States v. Edwards*, 430 A.2d 1321, 1344 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). The distinction between trials and other proceedings "is not necessarily dispositive, or even important, in evaluating the First Amendment issues." *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring).[15] In short, "[p]ublic access to judicial proceedings serves an amalgam of functions, functions which are as applicable to critical pretrial hearings as to trials." *United States v. Edwards*, 430 A.2d 1321, 1344 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).[16]

1. Open judicial proceedings provide a fundamental safeguard for the fair conduct of the criminal justice system.

Public scrutiny is an essential safeguard of the fairness and quality of the criminal justice process. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606. Public access to judicial proceedings in criminal cases discourages misconduct by police, prosecutors and judges, "encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 104 S. Ct. at 2215. As this Court has declared, "'[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (Burger, C.J., announcing judgment) (quoting J. Bentham, Rationale of Judicial Evidence 524 (1827)).

Indeed, public scrutiny of judicial decisionmaking and law enforcement activities may nowhere be more crucial than at a preliminary hearing where an initial judicial determination is made either to subject the accused to the ordeal of a trial or to set him free, *see, e.g., Coleman v. Alabama*, 399 U.S. 1, 8 (1970); at an entrapment, due process or suppression hearing, where the propriety of the government's conduct is typically at issue, *see, e.g., Waller v. Georgia*, 104 S.Ct. 2210 (1984); or at a bail or pretrial detention hearing, which may result in the prolonged imprisonment of the accused, *see, e.g., United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). These proceedings, if incompetently or corruptly conducted, can be as destructive of the rights of the accused and the public as the trial itself.

Moreover, pretrial judicial proceedings are conducted without the benefit of a jury, long recognized as "'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'" *Williams v. Florida*, 399 U.S. 78, 100 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)). Thus, absent public access to pretrial criminal proceedings, many consequential decisions and actions of the courts and their officers "may go unscrutinized." *United States v. Criden*, 675 F.2d at 557.

Pretrial proceedings, such as preliminary and suppression hearings, commonly involve live testimony and cross-examination. *See* Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 866-69, 884, 963-72 (5th ed. 1980). Indeed, this Court has expressly noted the importance of the preliminary hearing in preserving testimony, impeaching witnesses, and

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[15]While a history of openness may alone compel a right of access to judicial proceedings, it is not a prerequisite, for the right of access is based only partly on the historical openness of the criminal courts. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), for example, this Court applied the First Amendment right of access to a trial involving the alleged rape of two teenaged girls, despite "a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors," *id.* at 614 (Burger, C.J., dissenting). The Court held that "[w]hether the First Amendment right of access to criminal trials can be restricted in the context of any particular trial . . . depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction." *Id.* at 605 n.13.

[16]In *Waller v. Georgia*, 104 S.Ct. 2210, 2215 (1984), the Court recognized that those same structural values that undergird its decisions recognizing a First Amendment right of access to trial proceedings "are no less pressing in a hearing to suppress wrongfully seized evidence."

enabling the defendant to discover important witnesses. *See Coleman v. Alabama*, 399 U.S. at 9. Hence, the salutary effects of publicity in "encourag[ing] witnesses to come forward and discourag[ing] perjury" are as important at these stages of the criminal process as at the trial. *See Waller v. Georgia*, 104 S.Ct. at 2215.[17]

Information gained by the public at even the most "routine" judicial proceedings has served to root out official misconduct beyond the bounds of the criminal justice process itself. The Watergate scandal might well have escaped detection if the original bail hearing of the Watergate burglars had not been open to the press and public. Following the June 17, 1972 break-in at the headquarters of the Democratic National Committee, *Washington Post* reporter Bob Woodward attended a presumably perfunctory bail hearing. At that hearing, Woodward learned the names of the burglary suspects, that one of the suspects was a "security consultant" and a retired CIA employee, that the burglary may have been politically motivated, and that, curiously, the suspects were represented by retained counsel. *See* C. Bernstein & R. Woodward, All The President's Men 16-18 (1974). The first news report concerning the Watergate burglary appeared the following day in *The Washington Post*, *see* Wash. Post, June 18, 1972, at A1, col. 1, which undertook an investigation that eventually would help uncover "an unprecedented scandal at the highest levels of government," *United States v. Haldeman*, 559 F.2d 31, 51 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977).

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[17]To ensure the fair and impartial administration of justice, there is also an "imperative need for total and absolute independence of judges . . . in any phase of the decisional function." *Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970). Public scrutiny of the pretrial adjudicatory process helps ensure that the judicial branch is not subject to undue influence from officials of the other departments of government, that judicial decisionmakers remain "neutral and detached," *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975), and that a judge's decisions are not "based on secret bias or partiality," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (Burger, C.J., announcing judgment).

2. Open judicial proceedings in criminal cases facilitate the free discussion of public affairs.

Underlying the First Amendment right of access to judicial proceedings in criminal cases "is the common understanding that 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Specifically, "[o]ne of the demands of a democratic society is that the public should know what goes on in the courts by being told by the press what happens there." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 573 n.9 (Burger, C.J., announcing judgment). Thus, the right of access to judicial proceedings "ensure[s] that [the] constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 605.

In our system of government, an independent judiciary is entrusted with responsibility for bringing "offenders . . . to account for their criminal conduct." *Press-Enterprise I*, 464 U.S. at 509, holding "the balance nice, clear and true between the state and the accused," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), and defending individual liberties against official abuses, *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), responsibilities not always shared by the other participants in the criminal justice system. For the public to be fully informed about the system's performance of these vital functions, it must be able to view the entire judicial process, a process that is now typically completed before trial. Indeed, issues of prosecutorial misconduct, exclusions of confessions and illegally obtained evidence, or the incompetence of the accused to stand trial, all usually disposed of in pretrial hearings, are of greater significance to the free discussion of public affairs in many cases than the guilt or innocence of the accused. *See Journal Newspapers, Inc. v. State*, 54 Md. App. 98, 109, 456 A.2d 963, 969 (1983).

A variety of significant issues of public policy may be raised in pretrial criminal proceedings. In Los Angeles, for example, a preliminary hearing lasting more than nineteen months has

led to a nationwide examination of the problem of child abuse.[18] The hearing has involved the alleged sexual abuse of scores of preschool children over a ten-year period at the McMartin Preschool in Manhattan Beach, California.[19] The so-called "*McMartin*" case has sparked a public debate concerning alleged inefficiency, unfairness, and delay in the preliminary hearing process,[20] as well as "the judicial system's ability to deal effectively and fairly with the emotionally charged issue of allegations of sexual abuse of children," *Reporter's Notebook: 6 Months of California Case*, New York Times, Feb. 13, 1985, § A, at 16, col. 2.[21] Prompted by the *McMartin* preliminary hearing, the California legislature passed controversial reform legislation allowing certain child victims of sexual abuse to testify by closed circuit television.[22] Testimony at the preliminary hearing also helped engender a nationwide examination of the quality of day care facilities[23] and resulted in the creation of model day care guidelines by the United States Department of Health and Human Services.[24] These ramifications of public access to the preliminary hearing in the *McMartin* case illustrate the necessary dependence of an informed discussion of public affairs on open judicial proceedings.

Ultimately, public access to pretrial judicial proceedings enhances "the appearance of fairness so essential to public

[18]*See, e.g., Child Molestation Case A Long Way From Trial; Preliminary Hearings Are 9 Months Old*, Wash. Post, May 10, 1985, § 1, at E1; *Boy's Responses At Sex Abuse Trial Underscore Legal Conflict*, N.Y. Times, Jan. 27, 1985, § 1, part 1, at 14, col. 1; *Reporter's Notebook: 6 Months of California Case*, N.Y. Times, Feb. 13, 1985, § A, at 16, col. 2.

[19]*See Child Abuse Case Marked by Delays*, N.Y. Times, Sept. 9, 1984, § B, at 21, col. 1.

[20]*See, e.g.*, N.Y. Times, Sept. 9, 1985, § B, at 21, col. 1; Wash. Post, May 10, 1985, § 1, at E1.

[21]*See also* N.Y. Times, Jan. 27, 1985, § 1, part 1, at 14, col. 1.

[22]*See* Wash. Post, May 10, 1985, § 1, at E1; N.Y. Times, Sept. 9, 1985, § B, at 21, col. 1.

[23]*See, e.g., Increased Demand For Day Care Prompts A Debate On Regulation*, N.Y. Times, Sept. 2, 1984, § 1, part 1, at 1, col. 1.

[24]*See, e.g., Boy Recants Testimony In Child Abuse Case*, N.Y. Times, Jan. 25, 1985, § A, at 10, col. 6.

confidence" in the criminal justice system, *Press-Enterprise I*, 464 U.S. at 508, and serves "an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 571 (Burger, C.J., announcing judgment). If a defendant is unexpectedly released following a closed hearing, such an event "can cause a reaction that the system at best has failed and at worst has been corrupted." *Id.* Conversely, since plea bargaining has become the predominant means of resolving criminal cases, *see* U.S. Department of Justice, The Prosecution of Felony Arrests, 1980, at 18 (1985), a pretrial hearing is typically the only occasion at which the community can satisfy its "urge to retaliate and desire to have justice done," *Press-Enterprise I*, 464 U.S. at 509. "[R]esults alone" cannot assuage "the natural community desire for 'satisfaction,'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 571 (Burger, C.J., announcing judgment), and open proceedings have proven to be the most effective mechanism for ensuring public awareness and acceptance.

II. JUDICIAL PROCEEDINGS IN CRIMINAL CASES CANNOT BE CLOSED TO THE PRESS AND PUBLIC UNLESS:

A. OPEN PROCEEDINGS WOULD CREATE A CLEAR AND PRESENT DANGER TO THE FAIRNESS OF THE TRIAL;

B. NO LESS RESTRICTIVE ALTERNATIVES TO CLOSURE ARE AVAILABLE; AND

C. CLOSURE WILL EFFECTIVELY PROTECT AGAINST THE PERCEIVED HARM.

Because of the constitutional presumption against barring the press and public from judicial proceedings in criminal cases, the justification for closure "must be a weighty one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606. The need for closure must be demonstrably "compelling" and any measures to accommodate that need must be "narrowly tailored." *Id.* at 607. To ensure protection of precious First Amendment rights, it is crucial that appellate courts "impress

upon trial courts the need for meticulous and conscientious decision-making in evaluating motions for closure." *State v. Williams*, 93 N.J. 39, 70 n.17, 459 A.2d 641, 657 n.17 (1983). Thus, a number of courts have adopted the standards proposed by the American Bar Association for determining when "closure is essential to preserve higher values." *Press-Enterprise I*, 464 U.S. at 510.[25] Under the ABA test, a court may close a pretrial proceeding and seal the record only if the party seeking closure can meet the burden of proving: (A) "the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial," and (B) "the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means."[26]

In addition, an infringement of First Amendment liberties can never be tolerated if it will realistically be unable to accomplish its intended purpose. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 565-67 (1976); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979); *id* at 110 & n.3 (Rehnquist, J., concurring). Finally, the trial court must articulate the reasons for closure on the record in "findings specific enough that a reviewing court can determine whether the

[25]*See, e.g., In re P.R. v. District Court*, 637 P.2d 346, 352-53 (Colo. 1981) (en banc); *Kansas City Star Co. v. Fossey*, 230 Kan. 240, 247-50, 630 P.2d 1176, 1181-84 (1981); *State ex rel. Smith v. District Court*, 654 P.2d 982, 987 (Mont. 1982).

[26]American Bar Ass'n, Standards Relating to the Administration of Justice, Fair Trial and Free Press, Standard 8-3.2 (2d ed. 1980). *See United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982). The Ninth Circuit in *Brooklier* articulated a test permitting closure only when a court makes findings, articulated in the record, that (A) there is a substantial probability that a compelling interest will suffer irreparable harm absent closure; (B) no adequate alternatives to closure are available; and (C) closure will effectively protect against the perceived harm. *Id.* at 1167 (quoting *Gannett Co. v. DePasquale*, 443 U.S. at 440-42 (Blackmun, J., concurring in part)). *See also* 28 C.F.R. § 50.9 (1985) (requiring United States attorneys to oppose closure of any federal trial, pre- or post-trial evidentiary hearing, or plea or sentencing proceeding, with specified exceptions, except in those "very few cases" where "closure is plainly essential to the interests of justice").

closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.[27]

A. Pretrial Publicity Will Rarely, If Ever, Prevent A Fair Trial.

This Court has squarely held that "pretrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial." *Nebraska Press Association v. Stuart*, 427 U.S. at 554. Jurors need not begin the trial unaware of news reports regarding the crime with which the defendant is charged, even though those reports contain material inadmissible at trial. *See*

[27]Although the California Supreme Court did not discuss in its opinion below whether the record in this case contains sufficient evidence to meet its test of "reasonable likelihood of prejudice" to the defendant's fair trial right, the court of appeal concluded that the test was met in this instance by the mere existence of extensive, although factual, news coverage of the alleged crime over a two-year period. *See Press-Enterprise Co. v. Superior Court*, 150 Cal. App. 3d 888, 198 Cal. Rptr. 241, 248-149 (1984). This standard utterly "ignore[s] the real difference in the potential for prejudice" between largely factual publicity and "that which is invidious or inflammatory." *Murphy v. Florida*, 421 U.S. 794, 800 n.4 (1975). For all practical purposes, the California courts' standard at best creates a presumption of closure of pretrial proceedings in any publicized criminal case; at worst, it is a requirement of closure under such circumstances. For, as this Court has noted, to demand that jurors in such cases be "totally ignorant of the facts" of the case to be tried at the time they are sworn "'would be to establish an impossible standard.'" *Id.* at 800 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

In addition, the California Supreme Court asserted that, because "[t]he problem of potential prejudice to the defendant is substantially different in relation to public trials than it is in relation to public preliminary hearings," *Press-Enterprise Co. v. Superior Court*, 37 Cal. 3d 772, 776, 691 P.2d 1026, 1028, 209 Cal. Rptr. 360, 362 (1984), the First Amendment is inapplicable to preliminary hearings. Assuming *arguendo* that news coverage of preliminary hearings produces a greater risk of prejudice than does trial publicity, even a compelling governmental interest "does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary . . . ." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608. The concerns of the California Supreme Court can be adequately "addressed by balancing the need for closure against the right of access, not by refusing to recognize such a right." *United States v. Edwards*, 430 A.2d 1321, 1344 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

Murphy v. Florida, 421 U.S. 794, 799 (1975). As this Court has stated, even if pretrial publicity would likely create in the minds of all prospective jurors a "preconceived notion as to the guilt or innocence of an accused," that fact, "without more," is insufficient to demonstrate a violation of the accused's right to a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*

Empirical research reinforces this Court's traditional skepticism concerning the prejudicial impact of pretrial publicity. These studies "indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence." R. Simon, The Jury: Its Role in American Society 117 (1980). *Accord* J. Buddenbaum, D. Weaver, R. Holsinger & C. Brown, Pretrial Publicity and Juries: A Review of Research 2 (1981) [hereinafter cited as J. Buddenbaum]. For example, an experiment at the University of Minnesota identified no difference in the verdict patterns of jurors exposed to prejudicial news stories before a mock trial and jurors who were not so exposed. *See* Kline & Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, Journalism Q., Spring 1966, at 113-16. Another study utilizing subjects drawn from local voter registration lists found that, to the extent jurors are influenced by sensational news stories before the trial, the trial process virtually eliminates any influence of the stories and leads to a verdict based solely on the trial evidence. *See* Simon, *Murder, Juries, and the Press*, Trans-Action, May-June 1966, at 40. "The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning, and greater detachment." R. Simon, *supra*, at 117. Other studies have produced similar findings.[28]

[28] *See, e.g., The Men at the Bar Meeting Debate Gannett v. DePasquale*, The Quill, March 1980, at 8; W. Grady, Prejudicial Pretrial Publicity: Its Effects on Juries and Jurors (1972) (unpublished thesis, Northwestern University); Simon & Eimermann, *The Jury Finds Not Guilty: Another Look at Media Influence on the Jury*, Journalism Q., Summer 1971, at 343; S. Riley, The Free Press-Fair Trial Controversy: A Discussion of the Issues and an Examination of Pretrial Publicity by Survey Research (1970) (unpublished Ph.D. dissertation, University of North Carolina); Kaplan, *Of Babies and Bathwater*, 29 Stan. L. Rev. 621 (1977); Wilcox, *The Press, the Jury, and the Behavioral Sciences*, Journalism Monographs, Oct. 1968, at 20.

Moreover, research indicates that prospective jurors exposed to pretrial media coverage of a criminal case are less likely to prejudge the case than those who learned about it from other second-hand accounts. *See* Riley, *Pretrial Publicity: A Field Study*, Journalism Q., Spring 1973, at 17.

Such findings are emphatically confirmed by actual experience. Despite substantial adverse pretrial publicity, the trials of such notable criminal defendants as John DeLorean, John Hinkley, Claus Von Bulow, Dan White, Maurice Stans, John Connally and Angela Davis all ended in verdicts of acquittal. "These verdicts may be the most reliable and powerful data we have about jurors' ability to withstand pretrial publicity." R. Simon, *supra*, 117-18.

In the *DeLorean* case, for example, a poll taken before the trial, and before a major television network aired a highly incriminating videotape, indicated that ninety-two percent of those living in the trial locale were familiar with the case and seventy percent believed the defendant was guilty. *See* Brill, *Inside the DeLorean Jury Room*, Am. Law., Dec. 1984, at 1. Yet, following a four-month trial, the jury returned a verdict of not guilty. *Id.* Similarly, a survey of twenty trials in the Chicago area that were preceded by "massive pretrial publicity" found that in all twenty cases, the defendants were acquitted. *See The Men at the Bar Meeting Debate Gannett v. DePasquale*, The Quill, March 1980, at 8.

Even when publicity from a sensational case arguably saturates a community, many potential jurors usually are not even aware of the existence of press coverage. *See CBS, Inc. v. United States District Court*, 729 F.2d 1174, 1179 (9th Cir. 1983). In one of the recent "Abscam" prosecutions of congressmen and other public officials on charges arising from an elaborate F.B.I. undercover "sting" operation, for example, the Second Circuit concluded that, despite extensive media coverage, "only about one-half of the prospective jurors indicated that they had ever heard of Abscam . . . [and] only eight or ten [of those] had anything more than a most generalized kind of recollection what it was all about." *Application of National Broadcasting Co.*, 635 F.2d 945, 948 (2d Cir 1980).

Accord United States v. Mitchell, 551 F.2d 1252, 1262 n.46 (D.C. Cir. 1976), *rev'd on other grounds*, 435 U.S. 589 (1978) ("it would be possible to empanel a jury whose members had never even heard the [Watergate] tapes").

Only on rare occasions are convictions so tainted by prejudicial publicity that they must be reversed. *Nebraska Press Association v. Stuart*, 427 U.S. at 554; *see United States v. Haldeman*, 559 F.2d 31, 60-61 & n.32 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977). Indeed, a study of 63,000 appeals of criminal convictions in all fifty states over a five-year period found that in only twenty-one cases did the states' highest appellate courts overturn convictions based all or in part on prejudicial publicity. *See* Spencer, *Coverage Seldom Cause for Conviction Reversal*, Presstime, Oct. 1982, at 16. In only 368 cases did defense attorneys even raise the issue of prejudicial publicity. *Id.* Notably, only once has this Court reversed a conviction because it found that pretrial publicity, standing alone, made a fair adjudication impossible. *See Rideau v. Louisiana*, 373 U.S. 723 (1963).[29] Thus, both empirical research and practical experience teach that pretrial publicity rarely, if ever, poses a serious threat to a criminal defendant's right to a fair trial.

[29]In *Rideau*, film of a police interrogation of the defendant, in which he confessed to murder, kidnapping, and robbery, was broadcast on three consecutive days by local television stations. Because the Court concluded that "this spectacle . . . in a very real sense *was* Rideau's trial," it held that the accused's actual trial became "but a hollow formality." 373 U.S. at 726. Even in this extreme case, Justices Harlan and Clark dissented on the ground that the defendant's right to a fair trial had not been violated, *id.* at 727-33, and the majority noted that a change of venue would have adequately protected that right, *id.* at 727. All other cases in which this Court has invalidated convictions because of violations of defendants' fair trial rights have turned on factors other than the presence of pretrial publicity. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966).

On other occasions, this Court has found trials to be fair despite jurors' admitted predisposition against the accused. *See, e.g., Murphy v. Florida*, 421 U.S. 794 (1975) (no due process violation despite jurors' knowledge of defendant's criminal record and admissions by several jurors that such knowledge probably would influence the verdict); *Beck v. Washington*, 369 U.S. 541, 579-88 (1962) (Douglas , J., dissenting) (due process claim rejected by Court despite unprecedented pretrial publicity which "thoroughly discredited" defendant, and failure of trial judge to admonish jurors regarding publicity and bias); *Stroble v. California*, 343 U.S. 181, 199-202 (1952) (Frankfurter, J., dissenting) (due process claim rejected despite "notorious widespread public excitement" and sensational news coverage of defendant's alleged sex crime).

In the instant case, the courts below dismissed objections to the language of the closure standard invoked by a trial judge as squabbles over semantics. *See, e.g., Press-Enterprise Co. v Superior Court*, 37 Cal. 3d 772, 781, 691 P.2d 1026, 1032, 209 Cal. Rptr. 360, 366 (1984). Given the demonstrated improbability that pretrial publicity will even place a criminal defendant's right to a fair trial in jeopardy, however, the substantive standard applied by the trial judge assumes crucial importance. Unless trial courts understand that closure is only appropriate on those rare occasions when the defendant's constitutional rights are *in fact* endangered, they will continue to subordinate the public's acknowledged First Amendment right of access to the remote possibility that another constitutional right may otherwise be infringed. In short, as the ABA has recognized by adopting a "clear and present danger" standard, the test for closure must have "teeth" so that trial judges will apply it diligently to the facts of concrete cases with an informed appreciation of its purpose.

B. Closure Is Justified Only If No Less Restrictive Alternatives Are Available.

"In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats" to the rights of the accused. *Nebraska Press Association v. Stuart*, 427 U.S. at 551. Consequently, in order to justify closure of any portion of a pretrial proceeding, the court must first consider and reject alternatives to closure that are less restrictive of the exercise of First Amendment rights. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 580-81 (Burger, C.J., announcing judgment); *Press-Enterprise I*, 464 U.S. at 511. These alternatives include "searching questioning of prospective jurors" during *voir dire* "to screen out those with fixed opinions as to guilt or innocence," *Nebraska Press Association v. Stuart*, 427 U.S. at 564; "emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court," *id.*; change of trial venue to a locale less exposed to

pretrial publicity, *id.* at 563; "postponement of the trial to allow public attention to subside," *id.* at 563-64; and sequestration of jurors, *id.* at 564. Moreover, the trial court retains wide latitude to craft other alternatives to closure in order to minimize the effect of pretrial publicity. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

Foremost among the alternatives to closure is *voir dire*. Courts regularly rely upon carefully conducted *voir dire* as the most effective means to "screen out" individuals who may have been prejudiced by pretrial news reports. *See, e.g., Patton v. Yount*, 104 S. Ct. 2885 (1984); *Murphy v. Florida*, 421 U.S. 794, 800-04 (1975). Research data demonstrate that "the effects of any pretrial publicity can be decreased, if not completely removed" by such "careful *voir dire* examination." J. Buddenbaum, *supra*, at 11; *see* Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, Judicature, April 1974, at 386.

Empirical studies also provide evidence of how careful instructions and admonitions can be effective in ensuring that jurors give weight only to the evidence before them. *See, e.g.*, Simon, *Murder, Juries, and the Press*, Trans-Action, May-June 1966, at 40. The presumption that jurors will follow proper and adequately explained instructions is a cornerstone of the criminal judicial system. *See Nebraska Press Association v. Stuart*, 427 U.S. at 564.

This Court has recognized that the passage of time alone substantially dilutes any effect of adverse news coverage. *See Patton v. Yount*, 104 S. Ct. at 2889-90; *Stroble v. California*, 343 U.S. 181, 191-94 (1952). Sequestration, of course, can be employed only after the jury has been selected. Nevertheless, some courts have opted for sequestration by postponing pretrial proceedings until the jury has been sworn. *See, e.g., Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, *cert. denied*, 449 U.S. 992 (1980). This approach eliminates any possibility of prejudice to the accused without infringing the public's First Amendment rights. Even if the jury is not sequestered during pretrial proceedings, sequestration still "enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths." *Nebraska Press Association v. Stuart*, 427 U.S. at 564. Finally, this Court has encouraged a change of venue where pretrial publicity is likely to prevent the empanelling of an impartial jury. *See, e.g., Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

In the instant case, the trial court did not consider any alternatives to closure of a forty-one day preliminary hearing. This fact alone warrants invalidation of the closure order. *See Press-Enterprise I*, 464 U.S. at 511. *Post hoc* assertions by the California Court of Appeal that the trial court somehow balanced the public's right to an open hearing against the defendant's fair trial right "cannot satisfy the deficiencies in the trial court's record." *Waller v. Georgia*, 104 S.Ct. at 2217 n. 8. In any event, neither appellate court below examined the record for itself to determine whether probing *voir dire* or careful jury instructions would adequately protect the defendant's rights. Moreover, neither appellate court even considered a continuance, change of venue or sequestration to be legitimate alternatives to closure, despite the fact that this Court has repeatedly invoked precisely these mechanisms as judicial responses preferable to the infringement of First Amendment rights, *see Nebraska Press Association v. Stuart*, 427 U.S. at 564, that adequately safeguard the fairness of a criminal prosecution, *see Rideau v. Louisiana*, 373 U.S. at 727; *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

C. A Closure Order Must Effectively Protect Against The Perceived Harm.

Before closing any portion of a judicial proceeding in a criminal case, a trial court must also demonstrate that closure will effectively vindicate the defendant's right to a fair trial. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608-10; *United States v. Brooklier*, 685 F.2d at 1169. This principle demands that closure of judicial proceedings be denied unless there is a substantial probability that closure will be effective in protecting against the perceived harm. *Id.*

Thus, before closing a proceeding, the trial court must determine that the information sought to be withheld from public exposure by closure will not be made public anyway. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 609-10; *Gannett Co. v. DePasquale*, 443 U.S. at 442 (Blackmun, J., concurring in part). Closing a court proceeding does not restrict the press from gathering news from alternative sources or from publishing information intentionally or inadvertently leaked from a closed proceeding. *Id.* Moreover, when "there has already been a substantial amount of pre-trial publicity," a court simply "cannot unscramble the scrambled egg." *People v. Harris*, 6 Media L. Rep. (BNA) 1399, 1400 (Mich. Cir. May 30, 1980). Closure most certainly cannot stifle the spread of rumors, which may even be spawned by the suggestion of suppression that pervades a secret proceeding, *see In re Mack*, 386 Pa. 251, 277, 126 A.2d 679, 691-92 (1956), *cert. denied*, 352 U.S. 1002 (1957) (Musmanno, J., dissenting), and might be "more damaging than reasonably accurate news accounts," *Nebraska Press Association v. Stuart*, 427 U.S. at 567.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

DESCRIPTION OF AMICI

The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of about 1,400 newspapers constituting over ninety percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 24,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business is conducted in public and to keep governmental proceedings, including court hearings, open to the public.

American Broadcasting Companies, Inc. is a New York corporation which owns and operates a national television network (ABC), national radio networks, television and radio broadcasting stations, and, through various subsidiaries, also publishes magazines and books.

The American Society of Newspaper Editors (ASNE) is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and "the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people."

CBS Inc. is engaged, through its news division, in the nationwide dissemination of news, operates national television and radio networks, and owns and operates television and radio stations.

Chicago Tribune Company, a wholly-owned subsidiary of the Tribune Company, publishes the *Chicago Tribune*, the newspaper with the largest circulation in Illinois.

Chronicle Publishing Co. publishes *The San Francisco Chronicle*, a daily newspaper in San Francisco, California with a daily circulation of 535,562 and a Sunday circulation of 669,591. The Chronicle Broadcasting Co., a wholly-owned subsidiary of Chronicle Publishing Co., operates three television stations.

The Concord Monitor is a newspaper serving New Hampshire's capital city.

Dow Jones & Co., Inc. publishes, *inter alia*, The Wall Street Journal, Barron's National Business and Financial Weekly, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and twenty-two community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

Gannett Co., Inc. publishes USA TODAY and 85 other daily newspapers, 38 non-daily newspapers, and USA WEEKEND; it operates six television stations and fourteen radio stations. These Gannett subsidiaries operate newsrooms in 38 states, in Guam, The Virgin Islands, and the District of Columbia.

Globe Newspaper Company publishes *The Boston Globe*, a daily newspaper in Boston, Massachusetts.

The Hearst Corporation is a diversified privately-held company which is engaged in a broad spectrum of commercial activities including communications. It publishes nationally distributed magazines, newspapers and hard-cover and soft-cover books, and it owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

The Miami Herald Publishing Co., a division of Knight-Ridder Newspapers, Inc., publishes *The Miami Herald*, which has a daily circulation of 422,275.

The Minneapolis Star and Tribune Company, a division of Cowles Media Company, a Delaware corporation, publishes *The Minneapolis Star and Tribune*, a seven-days-a-week newspaper which circulates throughout the State of Minnesota.

The National Association of Broadcasters (NAB), organized in 1922, is a non-profit incorporated association of radio and television broadcast stations and networks. NAB membership includes more than 4500 radio stations, 850 television stations and the major commercial broadcast networks.

The National Newspaper Association is a trade association consisting of more than 5,000 weekly and daily newspapers located throughout the United States. Since 1885, a major purpose of the Association has been to preserve the constitutional guarantee of freedom of the press.

National Public Radio (NPR), an organization with over 300 member stations, produces the news programs "Morning Edition" and "All Things Considered." These programs cover legal issues and criminal proceedings in depth. Access to court proceedings is an essential tool for the reporters of NPR and its member stations.

The Philadelphia Inquirer is a daily and Sunday newspaper published in Philadelphia, Pennsylvania, and distributed in Pennsylvania, New Jersey and Delaware by Philadelphia Newspapers, Inc., which is a subsidiary of Knight-Ridder Newspapers, Inc.

Phoenix Newspapers, Inc. publishes *The Arizona Republic* and *The Phoenix Gazette*, with a combined daily circulation of 408,763, and *The Arizona Business Gazette*, a weekly newspaper in Phoenix, Arizona.

The Public Broadcasting Service (PBS) is a non-profit, membership corporation, the members of which are licensees of non-commercial, educational television stations. PBS's members produce a significant body of news, public affairs, and documentary programming both for their own local broadcast and for national distribution by PBS. PBS has a vital interest in

assuring its members access to important pretrial proceedings.

The Radio-Television News Directors Association (RTNDA) is a professional organization of more than 2000 news directors and others who are active in the supervising, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970. The Committee provided research assistance in the preparation of this brief.

Richmond Newspapers, Inc. publishes a morning newspaper, the *Richmond-Times Dispatch*, and an evening newspaper, *The Richmond News Leader* (combined circulation in excess of 250,000 and Sunday morning circulation 230,878), which are distributed in twenty-one cities and seventy-one counties throughout the Commonwealth of Virginia.

Scripps Howard, one of the nation's largest communications companies, is engaged in virtually every aspect of news and information gathering and dissemination. One American in nine is a Scripps Howard reader, viewer, or listener. Scripps Howard publishes daily newspapers in fourteen cities as well as a variety of non-daily newspapers, magazines, and business journals, and owns and operates radio and television stations, cable systems, Scripps Howard News Service, and United Media Enterprises, a multi-media service company.

Seattle Times Company is a Delaware corporation with its principal place of business in Seattle, Washington, where it publishes *The Seattle Times*, a daily newspaper.

The Washington Post, a division of the Washington Post Co., publishes a daily newspaper of general circulation in the Washington, D.C. area (circulation approximately 800,000 weekdays, 1,050,000 Sundays), and maintains a substantial newsgathering organization.

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No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PRESS-ENTERPRISE COMPANY,
Petitioner,
VS.
SUPERIOR COURT OF CALIFORNIA,
RIVERSIDE COUNTY,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF AMICI CURIAE OF CALIFORNIA NEWS ORGANIZATIONS IN SUPPORT OF PETITIONER

Filed on behalf of The Copley Press, Inc.; The Associated Press; *Los Angeles Times;* National Broadcasting Company, Inc. (NBC); McClatchy Newspapers; *San Francisco Chronicle;* Freedom Newspapers; The John P. Scripps Newspaper Group; Tribune Company; The Press Democrat; Santa Barbara News Press; Sparks Newspapers; McGraw-Hill, Inc.; The Sun Co.; Marin Independent Journal; Visalia Times-Delta; California Newspaper Publishers Association; California Freedom of Information Committee; The Radio and Television News Association of Southern California; California Society of Newspaper Editors; The East Bay Press Club; and Radio-Television News Directors Association NorCal.

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Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

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BRIEF AMICI CURIAE OF CALIFORNIA NEWS ORGANIZATIONS IN SUPPORT OF PETITIONER

INTEREST OF AMICI

On July 6, 1982, a Riverside, California municipal court judge began hearing testimony in *People v. Diaz*.[1] Forty-one hearing days and some 4,000 pages of transcript

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[1]This case arises from the California Supreme Court decision *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d 772, 691 P.2d 1026, 209 Cal.Rptr. 360 (1984); the underlying criminal case was *People v. Diaz*, Riv. No. 811120. To avoid confusion between the Court's decision, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), and the California decision, *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d 772 (1984), that is the subject of this petition, Amici will refer to the California decision as *Diaz*. Pursuant to Rule 42, Amici file concurrently with this brief the parties' written consent.

later, he ordered Diaz to stand trial for murder. The preliminary hearing was conducted in secret.[2]

Diaz stood accused of an extraordinary number of unexplained deaths in several hospitals. The charges against Diaz cast a cloud over the whole community, many of whose members were patients or friends and relatives of patients in those hospitals. Yet, for months, no one in the community was allowed to know anything about the testimony against Diaz, about the quality of the investigation that led to the charges against him or about the mass of detailed autopsy and other evidence that unfolded in the preliminary hearing and which might have shed light on the quality of care in the affected hospitals.

Diaz' motion to exclude the public consisted solely of the following oral statement:

> At this time, after conferring with my client, I would like to exclude all press and prospective witnesses under 868 from the courtroom. I feel in the best interest of my client, and possibly because of the fact that this case eventually will be tried in the County of Riverside, that the press be excluded from the proceedings in this matter.

[2]At the close of testimony, the judge ordered the entire transcript sealed. It remained sealed until after Diaz waived his right to a jury trial more than a year after the preliminary hearing began.

Tr. Vol. I, p. 11.

The Court ruled:

> Therefore, I find that the motion should be granted to protect the Defendant's right to a fair trial, and impartial trial. Therefore, the media cannot be present nor can the public.

Tr. Vol. I, p. 12.

In ruling on a subsequent motion to unseal the transcript, the California Supreme Court countenanced the closure as a proper application of the legislative mandate that preliminary hearings remain open absent a finding that closure is "necessary" to protect the rights of the accused. In spite of the Court's *Richmond Newspapers, Globe Newspaper* and *Press-Enterprise* decisions,[3] the California court held that the press and public have no First Amendment right to attend preliminary hearings in any circumstances.

Amici regularly report on criminal proceedings throughout California. Their ability to report on preliminary hearings, however, has been seriously compromised by the *Diaz* decision. Blinded by an unfounded fear of publicity, the California court has eviscerated legislative attempts to establish meaningful access rights and disregarded the overwhelming weight of the Court's recent pronouncements on the issue of public access to judicial proceedings.

[3]*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

SUMMARY OF ARGUMENT

Diaz epitomizes the California court's sanction of closed hearings, adopted in *San Jose Mercury-News v. Municipal Court*, 30 Cal.3d 498, 506, 638 P.2d 655, 179 Cal.Rptr. 772 (1982).[4] Although the preliminary hearing is the trial or trial equivalent in most California criminal cases, the court's ruling ignores both the important social values served by exposing a critical stage of the criminal justice process to public scrutiny and the history of courtroom access. Secret preliminary hearings prevent the public from understanding why an accused must, or need not, stand trial. Secret hearings promote public ignorance and weaken public confidence in judicial decisions on constitutional issues including evidence suppression and police misconduct. Secret hearings threaten the quality of the procedure and stymie the natural catharsis that the criminal justice process promotes. In short, secret preliminary hearings undermine the values that the Court identified in *Richmond Newspapers, Globe Newspaper* and *Press-Enterprise*. Amici submit that the press and public will not have meaningful access to this unique and critical stage of California's criminal justice process unless the Court firmly establishes a public right of access arising out of the First Amendment.

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[4]Just six weeks after the *San Jose Mercury-News* decision, the California Legislature established a strict standard to protect the public's right of access to preliminary hearings. It amended Penal Code § 868 so that preliminary hearings may be closed to the public *only* when "necessary in order to protect the defendant's right to a fair and impartial trial . . ." Penal Code § 868 (operative March 1, 1982) (Deering 1983).

ARGUMENT

PRELIMINARY HEARINGS HAVE SUPPLANTED TRIALS AS THE PRIMARY JUDICIAL INSTRUMENT OF CALIFORNIA CRIMINAL JUSTICE.

Because of its unique evolution in California, the preliminary hearing predominates over other adjudicatory criminal proceedings — this one hearing is, in the majority of felony cases, the only time when evidence of guilt or innocence is ever considered; it is a mechanism for determining the legality of pretrial detention; it plays a significant role in plea bargaining and sentencing; it provides the detailed basis for the state's charges; and it is the primary forum for the adjudication of constitutional issues.[5]

The Preliminary Hearing Often Functions as the Trial.

In contemporary California criminal procedure, the preliminary hearing typically functions as the trial or trial equivalent[6], and the accused has the full panoply of

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[5]In California, a preliminary hearing is constitutionally mandated, even after grand jury indictment. *Hawkins v. Superior Court*, 22 Cal.3d 584, 586-87, 586 P.2d 916, 150 Cal.Rptr. 435 (1978). Historically, its primary function is to determine if evidence exists sufficient to bind the accused over for trial. Penal Code § 872 (Deering 1983). Its array of functions makes it "the most important procedural mechanism in the administration of justice." Graham and Letwin, The Preliminary Hearing in Los Angeles — Some Field Findings and Legal Policy Observations, 18 *U.C.L.A. L.Rev.* 636, 641.

[6]In practice, the preliminary hearing proceeds like a trial. California prosecutors present a substantially complete case and rarely hold back surprise witnesses for the trial. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 658. The length and complexity of preliminary hearings compares to trials. The *Diaz* hearing, for example, with 41 days of testimony and some 42 witnesses and more than 80 exhibits, fairly represent preliminary hearings in major cases. Defense counsel cross-examined every witness and, in addition to statutory evidence

procedural safeguards guaranteed at trial. The accused has a constitutional right to counsel (*Johnson v. Superior Court* (Mosk, J. concurring), 15 Cal.3d 248, 256, 539 P.2d 792, 124 Cal.Rptr. 32 (1975)); the right to cross-examine prosecution witnesses (*Hawkins v. Superior Court,* 22 Cal.3d 584, 589, 586 P.2d 916, 150 Cal.Rptr. 435 (1978)); the right to call defense witnesses[7] (*Jennings v. Superior Court,* 66 Cal.2d 867, 875, 880, 428 P.2d 304, 59 Cal.Rptr. 440 (1967)); the right to compel the cooperation of hostile witnesses (*Hawkins v. Superior Court,* 22 Cal.3d at 589); and the right to raise defenses and to elicit testimony regarding defenses. (*Jennings v. Superior Court,* 66 Cal.2d at 880). Rules of evidence apply (*Rogers v. Superior Court,* 46 Cal.2d 3, 8, 291 P.2d 929 (1955)) and evidence is taken in substantially the same fashion as at trial. The judicial determination must be based solely on the evidence presented and the magistrate is empowered specifically to weigh the evidence and determine the credibility of witnesses. *De Mond v. Superior Court,* 57 Cal.2d 340, 343-45, 368 P.2d 865, 19 Cal.Rptr. 313 (1962). Indeed, the magistrate's powers are, as a practical matter, coextensive with those of a trial judge, and "neither the superior court nor an appellate court may substitute its judgment" on credibility issues. *Id.* at 345.

The preliminary hearing is the trial in many cases. In some 75 percent of the criminal trials in Los Angeles

objections, raised issues of Sixth Amendment confrontation (Vol. XXVI, 2716-2717), Fifth Amendment self-incrimination (Vol. XXVII, 2767) and Fourth Amendment suppression (Vol. XVII, 1852).

[7]In *People v. Buckey,* L.A. No. A750900 (the McMartin Pre-School case), for example, the defense has just begun to present its case, which is estimated to last six months. The preliminary hearing has been going on for 16 months. Because of the ages of the children allegedly victims of the charged sexual abuse, the accuseds' rights to in-court confrontation was extensively litigated.

County in 1967, the entire preliminary hearing transcript was submitted in evidence and used in lieu of live testimony. Bureau of Criminal Statistics, CRIME AND DELINQUENCY IN CALIFORNIA, 106 (1968). In a substantial number of those cases, no other evidence was offered. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 931. Throughout California, a smaller but still significant number of cases are "tried on the transcript." In 1975 for example, 731 of 4,527 felony cases, approximately 16 percent, were tried by transcript. In each instance, the preliminary hearing , although characterized as a "pretrial" proceeding, was the trial.[8]

Even when a case is not "tried on the transcript," the preliminary hearing often is the only hearing the accused has before a judicial officer, and it functions as the practical equivalent of the trial. Generally, almost nine times as many felony complaint dispositions involve a preliminary hearing as involve a trial. From 1978 through 1981, fewer than nine percent of all California felony complaint dispositions involved a criminal trial.[9] In approximately half of the felony dispositions, the accused pled before the preliminary hearing. Of the half that resulted in a preliminary hearing, approximately 90 percent of the accuseds were bound over for trial; in the other 10 percent, charges were dismissed. Of the felony

[8]In a similar proceeding, the District Court for the Southern District of New York, on the application of the Associated Press and *Newsday,* held that the press had the right to attend the pretrial deposition of Joseph Bononno, Sr., taken to preserve his testimony, as if reporting the trial. *United States v. Salerno,* 11 Med.L.Rptr. 2248 (1985).

[9]These statistics come from the California Department of Justice, Bureau of Criminal Statistics. The years 1978 through 1981 were selected because the Bureau did not keep adequate statistics from which to draw meaningful conclusions before 1978 and after 1981.

cases in which the accused was bound over, some 90 percent were disposed of by plea bargain and never went to trial. California Department of Justice, Bureau of Criminal Statistics.

Recently available statistics present essentially the same picture. In 1984, approximately 98,000 felony complaints were filed and some 52,000 preliminary hearings were held. Fewer than eight percent of the cases were tried.[10]

These statistics demonstrate that in an overwhelming majority of cases the preliminary hearing is, as a practical matter, the trial or trial equivalent. The preliminary hearing is the principal focus of the California criminal justice process. It is the only opportunity for public scrutiny of the evidence underlying the criminal charge. It is the only opportunity the public has to see a judicial officer making decisions in a criminal case. Accordingly, without access to preliminary hearings, the chance for public review of the evidence on which a charge is based, or of the judicial decisions based on that evidence, is rare.

The Preliminary Hearing Determines the Legality of Detention.

The preliminary hearing is the primary test of the legality of pretrial detention. It gives the magistrate an opportunity carefully to examine the factual basis for the charge, thus allowing a more accurate assessment of the accused's eligibility for recognizance release or bail. Indeed, recognition of this interest accounted in part for the adoption of the preliminary hearing system in California. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 939; 1 Califor-

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[10]California Administrative Office of Courts, Municipal Court Report 1984.

nia Constitutional Convention, Debates and Proceedings 309 (1878).

The Preliminary Hearing Plays a Significant Role in Plea Bargaining and Sentencing.

Preliminary hearing evidence forms the basis for guilty pleas and sentencing. Since 90 percent of the cases heard result in pleas, the magistrate's decision sets the parameters of any plea bargain and plays a pivotal role in controlling prosecutorial "overcharging" by preventing unsupported charges from going forward. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 714.

The preliminary hearing evidence also provides the factual basis for any plea and subsequent sentencing. A court reviewing the appropriateness of a plea bargain must have the same factual support for its decision. *Santobello v. New York,* 404 U.S. 257, 261 (1971). The preliminary hearing transcript is often the only evidence available.

The Preliminary Hearing Provides the Only Detail of the State's Charges.

California permits non-specific criminal pleadings, *See, e.g.,* Cal. Penal Code §§ 949, 950 (Deering 1983). *Brown v. Superior Court,* 234 Cal.App.2d 628, 632-633, 44 Cal.Rptr. 519 (1965). Both the complaint, which is the basis of the magistrate's preliminary hearing jurisdiction, and the information, which is the basis of the felony prosecution, frequently do little more than cite the statutory basis for the offense charged and the date of the offense. Accordingly, preliminary hearing evidence provides the facts typically missing from formal pleadings and gives the accused and the public their only detailed notice of the state's charges.

The Preliminary Hearing is the Primary Forum for Constitutional Litigation.

The California preliminary hearing has evolved to serve as the most important forum for the adjudication of constitutional issues. In California, constitutional issues are decided at the preliminary hearing and, in most cases, nowhere else.[11] Issues routinely determined at preliminary hearings include: whether an in-court identification is tainted by an illegal lineup, *United States v. Wade,* 388 U.S. 218 (1967); whether a lineup violates due process requirements, *People v. Caruso,* 68 Cal.2d 183, 436 P.2d 336, 65 Cal.Rptr. 336 (1968); whether eye witness identification testimony is admissible, *People v. Malich,* 15 Cal.App.3d 253, 93 Cal.Rptr. 87 (1971) overruled on other grds., *People v. Medina,* 6 Cal.3d 484, 492 P.2d 686, 99 Cal.Rptr. 630 (1972); whether a defendant waived his right to counsel in interrogation, *Miranda v. Arizona,* 384 U.S. 436 (1966); whether a confession is admissible, *People v. Jimenez,* 21 Cal.3d 959, 580 P.2d 672, 147 Cal.Rptr. 172 (1978); whether a co-defendant's statement can be edited sufficiently to permit a joint trial, *People v. Aranda,* 63 Cal.2d 518, 407 P.2d 265, 47 Cal.Rptr. 353 (1965); whether the confrontation clause is satisfied, *Pointer v. Texas,* 280 U.S. 400 (1965) and other suppression questions including the admissibility of evidence allegedly seized in violation of Fourth Amendment requirements, Cal. Penal Code § 1538.5(f) (Deering 1982).

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[11] As a practical matter, the preliminary hearing is the first point in the California criminal justice process where such constitutional issues *can* be raised. The accused is motivated to raise them at the time because favorable determination may dispose of the case. Graham and Letwin's research suggests that the majority of cases terminated at the preliminary hearing or in related proceedings were dismissed because of constitutional defects. Graham and Letwin, 18 *U.C.L.A. L.Rev.* at 942.

THE PUBLIC POLICY REASONS SUPPORTING ACCESS TO TRIALS APPLY EQUALLY TO PRELIMINARY HEARINGS IN CALIFORNIA.

The Court has held repeatedly that the First Amendment has a "structural role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc.,* 448 U.S. at 587 (Brennan, J. concurring, emphasis omitted); *Globe Newspaper Co.,* 457 U.S. at 604. Implicit in this structural role is a guarantee of "indispensable conditions of meaningful communication" on matters of public interest. *Richmond Newspapers, Inc.,* 448 U.S. at 588. The First Amendment's structural role "serves to insure that the individual citizen can effectively participate and contribute to our republican system of self-government" by assuring that the individual citizen's discussion of governmental affairs is an informed one. *Globe Newspaper Co.,* 457 U.S. at 604-05.

The Court has identified four ways both the judicial process and society benefit from public attendance at criminal proceedings:

1. Public scrutiny improves the quality of the proceeding;

2. Public access increases public understanding of the criminal justice system;

3. Public access fosters public confidence in the system; and

4. Public access contributes to a fuller community catharsis.

Richmond Newspapers, Inc., 448 U.S. at 569-73; *Globe Newspaper Co.,* 457 U.S. at 606; *Press-Enterprise Co.,* 464 U.S. at 508-09.

Public access to preliminary hearings produces those very same benefits; indeed, because of the predominant

role of the preliminary hearing in California, without public access these benefits are lost.

Access Improves the Quality of the Proceeding.

Public access to preliminary hearings improves the functioning of the hearing itself. As with trials, public access helps assure that the proceedings are conducted fairly to all concerned. Access discourages perjury,[12] the misconduct of participants, and prevents decisions based on partiality. As the Court recognized, "[w]ithout publicity, all other checks are insufficient." *Richmond Newspapers, Inc.*, 448 U.S. at 569.

Access Increases Public Understanding.

Access to preliminary hearings increases public understanding of the criminal justice process. Because the preliminary hearing plays such a unique and broad role in California's criminal process, public access there is at least as important as access at trial. Without it, the public is robbed of the opportunity to understand the factual basis for the charges against an accused, the opportunity to see firsthand how the prosecutor's discretion is exercised, and the opportunity to observe the judicial officer's determinations. Furthermore, since such a significant number of preliminary hearings are in fact the trial, public understanding can only be served by allowing access to these "trials on the transcript." Denial of access

[12]The value of public scrutiny is illustrated by *Los Angeles Coliseum Commission v. N.F.L.*, C.D. Cal. No. 78-3523-HP, in which a member of the public came forward and identified a juror who had failed to disclose during *voir dire* an economic interest in the case. As a result of news reports, the juror's nondisclosure came to light. See newspaper articles in the appendices to the Petition for Reconsideration, *Oakland Alameda County, et al. v. United States District Court*, U.S. Court of Appeals for the Ninth Circuit, No. 82-7070, filed, March 3, 1982.

to the preliminary hearing when the transcript is the only evidence for trial is tantamount to holding a secret trial. Closed preliminary hearings in these circumstances not only prevent the public from understanding the peculiar function of a preliminary hearing, but also prevent understanding of it as a trial.

Access Increases Public Confidence.

Public access to preliminary hearings fosters public confidence in the criminal justice system, no less than public access to trials. Indeed, because of the broad range of critical issues, particularly constitutional issues, decided at preliminary hearings, and because the preliminary hearing is the only evidentiary hearing on the merits in the overwhelming number of cases, public access to such hearings may be more important to maintain public confidence in the criminal justice system than public access to trials.

The fact that, in California, the majority of constitutional issues are decided at the preliminary hearing underscores this point. If preliminary hearings are held behind closed doors, key decisions on important constitutional questions remain secret. The public has a right to see these safeguards applied in particular cases. Announced decisions after secret proceedings are insufficient to maintain public confidence in the criminal justice system. As the Court recognized:

> [T]he sure knowledge that *anyone* is free to attend gives assurances that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Co., 464 U.S. at 508 (emphasis in original).

Public access is also important to maintain public confidence in the fundamental decision made at the preliminary hearing: whether the state's evidence is sufficient to subject an accused to a full criminal trial. The public is entitled to know whether the facts of a particular case justify continued prosecution, and the substantial, related public expense.[13] The public cannot have confidence in decisions to prosecute or not if it is barred from the information upon which those decisions are based.

Public access is also critical to public confidence in California's criminal justice system because of the unique role preliminary hearings play in plea bargaining and sentencing. Public criticism of bargained pleas and sentences turns to cynicism if the public is deprived access to the hearings that provide the factual basis for such pleas and sentencing decisions.[14]

Access Contributes to Community Catharsis.

Finally, public access to preliminary hearings creates the same community catharsis that public access to trials promotes. As the Court said:

> When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for those understandable reactions and emotions. Proceedings held in secret

[13]In San Diego County, for example, it costs some $8,000 a day to run a courtroom, excluding state expense for prosecution and defense lawyers, 1982 Grand Jury Report. By this standard, the *Diaz* preliminary hearing cost the taxpayers $320,000. The public certainly has the right to see first hand how public funds are being spent.

[14]A November 23, 1985 NEXIS search of just newspapers and magazines produced 2,060 articles that discuss plea bargaining. For example, "What John Walker Really Bargained For", *The New York Times*, November 10, 1985; "Spies, What One Man Bargained For", *The Economist*, November 9, 1985.

> would deny this outlet and frustrate the broad public interest; by contrast, public proceedings indicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct. . . .

Press-Enterprise Co., 464 U.S. at 509.

Since most criminal cases in California never result in a public trial, public access to the preliminary hearing is important for its community therapeutic value. In most cases, the preliminary hearing is the only hearing at which evidence is taken and the underlying merits of the charge are considered. In the vast majority of cases, the public's only opportunity to know that "offenders are being brought to account for their criminal conduct," is at the preliminary hearing.

In short, all the structural values identified in *Richmond Newspapers*, *Globe Newspaper* and *Press-Enterprise*, apply with equal, if not greater, weight to preliminary hearings in California.

THE CALIFORNIA EXPERIENCE UNDERSCORES THE NEED FOR A CONSTITUTIONAL AFFIRMATION OF THE PUBLIC'S RIGHT OF ACCESS TO PRELIMINARY HEARINGS.

Diaz and Post-_Diaz_ Decisions Derogate the Public's First Amendment Access Rights.

By holding that a magistrate shall close a preliminary hearing merely on the conclusory statement that a "reasonable likelihood of substantial prejudice" exists, *Diaz* practically guarantees closed hearings. Instead of putting a substantial burden on the party seeking closure, as the Court has required in *Richmond Newspapers*, *Globe Newspaper* and *Press-Enterprise*, the California court has set a standard so relaxed that a magistrate's concern about

subsequent appellate criticism or the fear of post-trial reversal in light of *Diaz* makes closure commonplace.

Furthermore, *Diaz* specifically disregards other requirements of *Richmond Newspapers, Globe Newspaper* and *Press-Enterprise* that would stiffen *Diaz's* otherwise impotent "reasonable likelihood" standard. *Diaz* expressly holds that a defendant need not present evidence to justify closure and that a "factual finding of actual prejudice is not required." *Diaz,* 37 Cal.3d at 782, 691 P.2d 1026, 209 Cal.Rptr. 360 (1984). Further, *Diaz* does not require the magistrate to consider alternatives to closure or to consider whether closure will in fact be effective. Finally, *Diaz* does not even mention the rigorous requirement the Court imposed, reiterated in federal appellate decisions,[15] that the basis for any closure decision be articulated in findings.

Not surprisingly, *Diaz* has spawned appellate progeny equally offensive to the public's First Amendment rights. In *Telegram-Tribune, Inc. v. Municipal Court,* 166 Cal.App.3d 1072, 213 Cal.Rptr. 7 (1985), the court upheld a trial court order closing a preliminary hearing and carried the *Diaz* "secret hearing" policy one step further by closing the *argument* on the closure motion. The court also approved a two-step procedure; the accused need only state in "general terms and conclusions" the basis for the motion; and the court, if satisfied, then holds the closure motion behind closed doors. In short, the court

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[15]*See, e.g., Application of the Herald Co.,* 734 F.2d 93, 100-01 (2d Cir. 1984); *Associated Press v. U.S. Dist. Ct. for C.D. of Cal.,* 705 F.2d 1143, 1146 (9th Cir. 1983); *United States v. Chagra,* 701 F.2d 354, 361-65 (5th Cir. 1983); *United States v. Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982); *United States v. Criden,* 675 F.2d 550, 560-61 (3d Cir. 1982).

sanctioned a procedure whereby the public is not even allowed to hear the basis for the court's closure decision.[16]

In *Tribune Newspapers West, Inc. v. Superior Court,* 172 Cal.App.3d 443, 218 Cal.Rptr. 505 (1985), the court construed a California statute which allows public access to juvenile proceedings "on the same basis as they may be admitted to trials in a court of criminal jurisdiction . . ." Welfare and Instit. Code, § 676(a). In deciding the public's right of access, the court held that the defendant need only establish the *Diaz* standard to justify closure of any such proceeding, trial or pretrial. *Id.* at 451. Accordingly, *Diaz* is being construed as a signal to lower appellate courts that even trials can be closed without evidence, findings, or the satisfaction of a meaningful burden.

Diaz and its progeny are being utilized increasingly at the trial court level.[17] For example, in *People v. Naddi,* S.D. No. F90410, a murder case, the accused moved to close both the preliminary hearing and the argument on that motion, citing *Telegram-Tribune.* The accused wanted to present live testimony to support closure and specifically moved to exclude lawyers representing the press

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[16]After *Telegram-Tribune,* the accused routinely moves for closed hearings on closure motions. *See, e.g.,* in San Diego, *People v. Lucas,* S.D. No. F89006; *People v. Naddi,* S.D. No. F90410; *People v. Troiani,* S.D. No. CRN9925.

[17]Since *Diaz,* closure motions have proliferated. For example, a partial list from California's three major metropolitan areas includes: *People v. Rogers,* S.F. No. 732798; *People v. Barr,* S.F. No. 740293; *People v. White,* S.F. No. 754937; (consolidated cases, motion denied but court reserved right to reconsider on certain witnesses); *People v. Troiani,* S.D. No. CRN9925 (motion granted); *People v. Ruby,* L.A. No. A909188 (motion denied); *People v. Miller,* L.A. No. A904176 (motion granted). The jury pools in San Francisco, San Diego and Los Angeles exceed a million persons.

during that testimony, thereby preventing any cross-examination. Before the court ruled on the motion, the accused himself withdrew his lawyers' motion.

In *People v. Lucas,* S.D. No. F89006, another murder case, the accused moved to close his arraignment using the *Diaz* standard. Under *Telegram-Tribune,* he also moved, successfully, to close the argument on the closure motion and the public was not even allowed to see the court's ruling that kept the arraignment open.

People v. Troiani, S.D. No. CRN9925, underscores *Diaz'* effect on trial courts' treatment of preliminary hearings. In *Troiani* a widow is charged with hiring five Marines to kill her Marine husband. Just before *Diaz* was published, on December 3, 1984, the press opposed defense closure motions and prevailed. When *Diaz* was published a few days later, the accused renewed their motions. The court considered closure on a witness by witness basis. The preliminary hearing lasted three and one-half months with 65 witnesses. The accused moved to close with virtually each witness' testimony. No evidence of a prejudice was offered, except for news clippings. Press attorneys appeared again and again opposing closure at a cost of thousands of dollars in legal fees. The court closed the hearing for approximately 50 witnesses.

A more recent and bizarre example is *People v. Prairie Chicken*, S.D. C 53092, in which Blaine Prairie Chicken is charged with biting a police officer's arm in a laundromat scuffle. Prairie Chicken then claimed that he has AIDS. The state joined in the accused's closure motion. The state's justification for closure was protection of the police officer's sensibilities; the accused's rationale was pretrial publicity. The court, acknowledging that the accused had produced no evidence of fair trial prejudice but apparently more concerned about a police officer's potential embarrassment than public access, closed the November 21, 1985 preliminary hearing and sealed the transcript.

Amici submit that, absent a reversal of *Diaz,* the California courts will continue to abuse the public's First Amendment right of access to criminal proceedings and encroach on the Court's clear mandate that such proceedings be open.

The California Closure Provision Is an Historical Aberration.

Not only does *Diaz* ignore the Court's decisions on public access but the very history of the preliminary hearing in California underscores that it is an historical anomaly. The closure provision, Penal Code section 868, came into being with California's 1851 wholesale adoption of the Field Code of Criminal Procedure, largely as a result of the legislative influence of David Dudley Field's brother, Stephen J.[18] For 131 years, until its 1982 amendment, section 868 gave the accused the unilateral right to close the courtroom.[19] The closure provision is an aberration precisely because it was included in the Field Code as a result of personal animus, because it was not enforced until recently and because it is at odds with the English and American tradition of open preliminary hearings.

---

[18]Geis, Preliminary Hearings and the Press, 8 *U.C.L.A. L.Rev.* 397, 410 (1961). Stephen J. Field later became a Supreme Court Justice. He figures prominently in the tangled and tawdry history of early San Francisco. See *Cunningham v. Neagle,* 135 U.S. 1 (1890) and Milton S. Gould, *A Cast of Hawks* (1985).

[19]New York, Field's own state, did not adopt his code until 1881. N.Y. Laws of 1881, c. 442, § 203. Seven years later, the provision mandating closure was made discretionary. N.Y. Laws of 1888, c. 220, § 1.

Professor Geis characterizes this closure provision as "an historical oddity,"[20] born of Field's personal antipathy toward the press.[21]

> It appears likely that the impetus for the original proposal for closed preliminary hearings was provided by Field's personal antipathy toward newspapers, an antipathy that he characteristically expressed with fiery vehemence in one of his essays. "There is something radically, flagrantly wrong in the conduct of most newspapers in the United States," Field wrote, inasmuch as "the right of reputation . . . is habitually violated." Jefferson, Field noted, had considered the press of his day "putrid" but "it has since become putrescence putrified." The action of newspapers in their reporting of a recent trial was compared by Field to that of "cormorants over a carcass."[22]

In addition, available evidence suggests that the closure provision was neither invoked nor enforced in California for more than 100 years. The first reported case upholding the provision was decided in 1959. *People v. Blanco,* 170 Cal.App.2d 758, 339 P.2d 906 (1959).[23]

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[20]Geis, 8 *U.C.L.A. L.Rev.* at 413n.8.

[21]*Id.* at 408.

[22]*Id.* at 408-09.

[23]Elsewhere, the Field Code provision appears to have had little impact on open preliminary hearings. In the other states that adopted it (Arizona, Idaho, Montana, New York, Nevada, North Dakota and Utah), it was apparently only rarely invoked, and those cases appear to have involved proceedings that would have been held *in camera* in any event. Geis, 8 *U.C.L.A. L.Rev.* at 409; *see also* Fenner and Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond,* 16 Harv. C.R. - C.L.L.Rev. 415, 434 (1981).

Finally, *Diaz* to the contrary, the tradition of open court preliminary hearings is rooted in English and American common law heritage. Although originally the preliminary hearing was a secret, inquisitorial affair,[24] 18th and 19th century reforms fundamentally changed its nature and purpose; it took on the attributes of a judicial proceeding and public access became the norm. *See,* Pollock, *The Expansion of the Common Law,* 31 (1904).[25] The brief amici curiae of the national news organizations filed in this case contains a scholarly discussion of these historical precedents which Amici adopt.

The *Diaz* Assumptions Are Incorrect.

The *Diaz* justification for closed preliminary hearings is that the publicity surrounding open hearings irreparably prejudices the jury pool and prevents the accused from obtaining trial by an impartial jury. The court's assumptions, without factual support, are fundamentally incorrect. Pretrial publicity does not necessarily result in an unfair trial; alternatives to closure are effective; and

---

[24]1 Stephen, *History of the Criminal Law of England,* 225 (1983); Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree,* 30 Mich.L.Rev. 1224, 1235 (1932).

[25]In the United States, as in England, preliminary hearings came to be regarded as public affairs with the advent of the judicial inquiry type proceeding. Geis, 8 *U.C.L.A. L.Rev.* at 401. The prescriptions of the 16th century English statutes, which were incorporated in early American colonial law, fell into gradual disuse in the 18th and 19th centuries. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree,* 30 Mich.L.Rev. 1[illegible]4, 1236 (1932). By 1851, the transition from the inquisitorial to the judicial proceeding was complete. Kauper at 1236-37. Significantly, there was no American counterpart to the 1848 English law provision allowing discretionary closure of preliminary hearings (11 & 12 Vic. c. 42, § 19) and the general practice was to hold the preliminary hearing open to the public and media. Geis, 8 *U.C.L.A. L.Rev.* at 407.

closure does not work. The brief amici curiae of national news organizations addresses these points at length and Amici adopt that argument without extended elaboration.

One post-*Diaz* experience underscores the error of the California court's assumptions. In a highly publicized San Diego case, *People v. Lucas,* S.D. No. F89006, the accused, at a taxpayer cost of some $2,500, commissioned a poll to establish that the potential jury pool was prejudiced. The accused was in his second preliminary hearing in six months. The first dealt with his alleged murder of a 22-year-old University of San Diego student. *People v. Lucas,* S.D. No. F87587. Even before Lucas was apprehended, the victim's disappearance and the facts surrounding her subsequently discovered murder were highly publicized. After the first preliminary hearing, which after initial closure[26] was opened to the public, Lucas was charged with three additional murders; they were the subject of the second preliminary hearing. To close the second hearing, Lucas submitted more than one hundred newspaper articles and his poll. The poll purported to show that 89 percent of San Diego County was aware of him or the charges against him in the first preliminary hearing and that some 57 percent was aware of him or the charges against him in the second preliminary hearing. Lucas' pollster admitted under cross-examination, however, that, in spite of extensive public knowledge of Lucas and his cases, at least 48 percent of persons polled would be perfectly adequate, fair and impartial jurors. Since the San Diego jury pool is approxi-

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[26]This closure hearing adds further insight into the effect of *Diaz.* The accused admitted he had no evidence of prejudice to support his motion — not even news clippings. Whereupon the court, acknowledging that the accused had the burden, took judicial notice of unspecified "publicity" and closed the hearing. *People v. Lucas.* S.D. No. F87587.

mately one and a half million persons, by the pollster's own testimony there is a pool of at least 750,000 fair and impartial potential jurors. This post-*Diaz* experience is another example that pretrial publicity is not what the California court assumes it to be.

THE COURT'S PRIOR DECISIONS SET AN APPROPRIATE STANDARD TO GUARANTEE THE PUBLIC'S RIGHT OF ACCESS TO PRELIMINARY HEARINGS.

The Court has established substantive and procedural standards to determine when a criminal adjudicatory proceeding may be closed consistent with the First Amendment.

First, a hearing at which the opponents of closure may present arguments must precede any contemplated closure. *Globe Newspaper Co.,* 457 U.S. at 609 n. 25.

Second, "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.,* 457 U.S. at 606-07. Otherwise phrased, the interest in closing the proceeding to the public must be "overriding." *Press-Enterprise,* 464 U.S. at 510.

Third, the justification for closure must be based on evidence and articulated in specific findings. *Richmond Newspapers, Inc.,* 448 U.S. at 581.

Fourth, the burden to establish the basis for closure is on the party seeking it. *Press-Enterprise Co.,* 464 U.S. at 510.[27]

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[27]In the Sixth Amendment context, the Court has, in *Waller v. Georgia,* ____ U.S. ____, 104 S.Ct. 2210 (1984), drawn on *Richmond Newspapers, Globe Newspaper,* and *Press-Enterprise,* to articulate a

A standard that is the logical outgrowth of the Court's articulations in *Richmond Newspapers, Globe Newspaper,* and *Press-Enterprise* has been adopted in substantially the same form by federal appellate and state courts. In *Associated Press v. U.S. Dist. Ct. for C.D. of Cal.,* 705 F.2d 1143 (9th Cir. 1983) (the *DeLorean* case), the court held that "a party seeking closure of proceedings or sealing of documents [must] establish that the procedure 'is strictly and inescapably necessary in order to protect the fair trial guarantee.' " *Id.* at 1145. Continuing, the court said:

> To meet this burden and justify abrogating the first amendment right of access, it is necessary to satisfy three separate substantive tests . . .
>
> First, there must be "a substantial probability that irreparable damage to [a defendant's] fair-trial right will result" if [the proceeding is not closed] . . .
>
> Second, there must be "a substantial probability that alternatives to closure will not protect adequately [the] right to a fair trial." [Citation.] In other words, there must be no less drastic alternatives available . . .
>
> Third, there must be "a substantial probability that closure will be effective in protecting against the perceived harm."

Id. at 1145-46.

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standard for determining when a suppression hearing can be closed over an accused's objection. The Court held:

> Under *Press Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

104 S.Ct. at 2216.

That standard, in substance but with different articulation, has been applied by a number of federal appellate courts. *Application of the Herald Co.,* 734 F.2d 93, 100-01 (2d Cir. 1984); *In re Globe Newspaper Co.,* 729 F.2d 47, 56-57 (1st Cir. 1984); *In re Greensboro News Co.,* 727 F.2d 1320, 1325 (4th Cir. 1984); *United States v. Chagra,* 701 F.2d 354, 365 (5th Cir. 1983); *United States v. Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982); *United States v. Criden,* 675 F.2d 550, 560-561 (3d Cir. 1982).

Numerous state courts have adopted a substantially similar standard. *See, e.g., Star Journal Publishing Corp. v. County of Pueblo County,* 197 Colo. 234, 237, 591 P.2d 1028 (1979) (clear and present danger); *Miami Herald v. Lewis,* 426 S.2d 1 (Fla. 1982) (necessary); *Iowa Freedom of Information Council v. Wifvat,* 328 N.W.2d 920 (Iowa 1983) (substantial probability of irreparable damage); *Ashland Publishing Company v. Asbury,* 612 S.W.2d 749 (Ky.App. 1980) (substantial probability of irreparable damage); *Journal Newspapers, Inc. v. Maryland,* 54 Md.App. 98, 456 A.2d 963 (1983), aff'd, *Buzbee v. Journal Newspapers, Inc.,* 297 Md. 68, 465 A.2d 426 (strict and inescapably necessary).

These articulations are consistent with the strict test adopted by the American Bar Association. The ABA Standards Relating to the Administration of Criminal Justice Section 8-3.2 (2d Ed. 1980) state that closure is permissible only upon a finding that: "(i) the dissemination of the information from the hearing would pose a clear and present danger to the fairness of the trial and (ii) the prejudicial effect of such information on the jurors cannot be avoided by any reasonable alternative means." The ABA standards were adopted as a result of experience that the "substantial likelihood" standard failed effectively to protect the public's right of access to preliminary hearings. Amici submit that the Court should

adopt the tripartite tests as articulated by the Ninth Circuit in *Associated Press* to secure both the public's right of access and the accused's right to a fair trial.

CONCLUSION

Three times since 1980, the Court has held that the press and public have a right, arising out of the First Amendment, to attend criminal judicial proceedings and has articulated procedural requirements to prevent impermissible closure. Twice since 1982, the California Supreme Court has ignored the Court's decisions. Amici respectfully request that the Court reverse the *Diaz* decision and affirm the right of press and public to attend preliminary hearings.

DATED: November 27, 1985

Respectfully submitted,

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APPENDIX

APPENDIX A

Description of Amici

1. The Copley Press, Inc. publishes five daily newspapers in California — *The San Diego Union, The Tribune, The Daily Breeze, News-Pilot* and *Evening Outlook* — whose combined circulation is nearly one-half million copies daily, as well as six daily newspapers in Illinois, and operates a national news service.

Harold W. Fuson, Jr.
Vice President and General Counsel
The Copley Press, Inc.
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Attorney for The Copley Press, Inc.

2. The Associated Press is a membership nonprofit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing and transmitting news reports and photographs to its 1,300 member newspapers and its 5,700 member broadcast stations throughout the United States, and to other publishers throughout the world.

Rogers & Wells
Richard N. Winfield
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3. *Los Angeles Times,* a division of The Times Mirror Company, is the largest daily newspaper in California, and has a general daily circulation of more than one million copies.

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Jeffrey S. Klein
Times Mirror Square
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Attorneys for *Los Angeles Times,*
a division of The Times Mirror Company

4. National Broadcasting Company, Inc. (NBC) provides programming, including news, for broadcast by owned and affiliated television stations throughout the country. NBC's news department continually covers pretrial and trial proceedings in criminal cases in California and elsewhere.

Donald L. Zachary
Tracy S. Rich
Robert G. Mendez
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Burbank, CA 91523
Attorneys for National Broadcasting Company,
Inc. (NBC)

5. McClatchy Newspapers is a communications company with seven daily and three nondaily newspapers in California, Washington and Alaska, having a total circulation in excess of 500,000.

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McClatchy Newspapers
2100 Q Street
Sacramento, CA 95852
Attorney for McClatchy Newspapers

6. *San Francisco Chronicle,* a division of The Chronicle Publishing Co., is a newspaper with a daily circulation of 540,000 and a Sunday circulation of 705,625. The Chronicle Broadcasting Co., a wholly owned subsidiary of Chronicle Publishing Co., operates three television stations.

Cooper, White & Cooper
Mark L. Tuft
44 Montgomery Street, Suite 3300
San Francisco, CA 94104
Attorneys for The Chronicle Publishing Co.

7. The John P. Scripps Newspaper Group is an affiliation of locally independent newspapers in California.

Harrison & Watson
Robert Robinson
530 B Street, Suite 2201
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Attorneys for The John P. Scripps Newspaper
Group

8. Freedom Newspapers publishes the *Orange County Register* in California and many other newspapers throughout the United States.

9. Tribune Company publishes the *Daily News* in Los Angeles, the *Peninsula Times-Tribune* in Palo Alto and the *Times-Advocate* in Escondido, California, as well as the *Chicago Tribune, New York Daily News* and other daily newspapers. It also owns a number of major independent radio and television stations.

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Vice President and General Counsel
Tribune Company
435 North Michigan Avenue
Chicago, IL 60611
Attorney for Tribune Company

10. *The Press Democrat* in Santa Rosa and the *Santa Barbara News-Press* are published in California by The New York Times Co., which also publishes *The New York Times* and a number of daily newspapers in other states.

Katharine P. Darrow
General Counsel
The New York Times Company
229 West 43rd Street
New York, NY 10036
Attorney for The New York Times Co.

11. Sparks Newspapers publishes various daily and weekly newspapers in California, including *The Daily Review, The Argus, The Tri-Valley Herald,* and *The San Ramon Valley Herald.*

12. McGraw-Hill, Inc. has a number of news bureaus in California which gather news for a variety of national publications. Its wholly owned subsidiary, McGraw-Hill Broadcasting Co., Inc., operates two California television stations, KGTV in San Diego and KERO-TV in Bakersfield.

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Barbara E. Schlain
Kenneth M. Vittor
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Attorneys for McGraw-Hill, Inc.

13. *The Sun* is published by The Sun Co. throughout San Bernardino County, California, with a total circulation of 80,000 daily. It is a Gannett newspaper.

Reid & Hellyer
Robert J. Bierschbach
P.O. Box 6086
San Bernardino, CA 92412
Attorneys for The Sun Co.

14. *Marin Independent Journal* is a daily newspaper serving Marin and southern Sonoma Counties in California. It is a Gannett newspaper.

15. *Visalia Times-Delta* is a daily newspaper serving Tulare and eastern Kings Counties, California. It is a Gannett newspaper.

16. The California Newspaper Publishers Association, a nonprofit mutual benefit association, comprises a membership of a majority of the state's daily and weekly newspapers of general circulation.

Michael B. Dorais
Terry Francke
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Attorneys for California Newspaper Publishers Association

17. California Freedom of Information Committee is a nonprofit organization representing the journalism profession of California. Its membership consists of working press, both print and broadcast, educators, press clubs, chapters of the Society of Professional Journalists — Sigma Delta Chi, the California Newspaper Publishers Association, and the California Broadcasters Association. Among its purposes is to protect, on behalf of the public, against all efforts to impose restraints

against the flow of information to which the public is entitled.

Kotler & Kotler
Jonathan Kotler
15910 Ventura Boulevard
Suite 1010
Encino, CA 91436
Attorneys for California Freedom of Information Committee

18. The Radio & Television News Association of Southern California is an organization of radio and television professionals whose members regularly cover criminal proceedings in California.

19. The California Society of Newspaper Editors is a professional society of newspaper editors organized to promote professional excellence and dedicated to upholding the First Amendment rights of their members.

20. The East Bay Press Club is an organization of journalists and editors who brought the first constitutional challenge to California Penal Code Section 686's closure provisions.

21. Radio-Television News Directors Association NorCal is a nonprofit organization representing news directors in Northern California broadcast media.

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No. 84-1560

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER FILED ON BEHALF OF THE DISTRICT ATTORNEY, COUNTY OF RIVERSIDE

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus respectfully submits this Brief of Amicus Curiae in support of the Brief from the petitioner on the merits. Amicus is the People of the State of California in the person of Grover C. Trask II, District Attorney for the County of Riverside, State of California. The People of the State of California are the party plaintiff in all criminal actions prosecuted in California courts. Amicus filed a criminal action against the defendant Robert Rubane Diaz on December 23, 1981, alleging twelve counts of murder in violation of Section 187 of the Penal Code. The matter subsequently was heard before a magistrate at the preliminary examination commencing on July 6, 1982, ending on August 3[illegible], 1982, and consuming forty-one days of court time and public resources. At the end of

the hearing, the transcripts were ordered sealed until further notice. On January 21, 1983, Amicus moved to have the transcripts of the preliminary examination released to the public in the Superior Court. The motion was denied and on March 11, 1983, Amicus filed a Petition for Writ of Mandate before the California Court of Appeal, Fourth District, Division Two, stating that the trial court abused its discretion in sealing the court records prior to trial in the case of *The People of the State of California* v. *Robert Rubane Diaz*. The Petition for Writ of Mandate was summarily denied on February 21, 1984. The Press-Enterprise Company filed a petition for hearing in the California Supreme Court. Petition for hearing was granted and the matter set for hearing. The People of the State of California, in the person of Grover C. Trask II, District Attorney for the County of Riverside, State of California, filed a Brief of Amicus Curiae in support of the petition. On December 31, 1984, the California Supreme Court rendered its decision determining that the First Amendment of the United States Constitution does not provide a right of access to preliminary examinations. It further determined that the statutory right of access under Penal Code Section 868 could be denied upon a showing of "reasonable likelihood of substantial prejudice" to the defendant's right to a fair trial.

It is of vital importance to the Amicus that the right of each party to fair criminal proceedings is protected without infringing on the constitutionally protected rights of the press, the public in general or individual persons. The issues presented in this case involve a balancing of the public's right of access to criminal proceedings and the right of the criminal defendant to be free from prejudicial pretrial publicity that may affect the criminal defendant's right to a fair and impartial trial.

It is for these reasons that the Amicus has a stated interest.

SUMMARY OF ARGUMENT

This Court has found that the press and the public have a *qualified* First Amendment right to attend a criminal proceeding. (*Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).)

This right, however, must be weighed against other interests such as the right of both the defendant and the People to a fair trial.

The preliminary examination is a critical stage of the criminal process, including many of the same evidentiary and procedural requirements as a trial or a pretrial suppression hearing. For these reasons there must be a *qualified* constitutional right to open preliminary examinations.

A magistrate's decision to restrict public access must be articulated in findings which acknowledge the interests involved, and the closure should take into consideration alternative solutions which limit the effect on the public's right of access to criminal trials.

In this case, the magistrate's order closing the preliminary examination in its entirety, and the trial court's order sealing the preliminary examination transcript were overbroad. The magistrate and trial judge made no articulated findings which would justify constitutionally denying public access to the hearing or all of the transcript. Both orders were based upon an unfettered and arbitrary

discretion on the part of the judicial officer, because of the lack of any constitutional guidelines or rules.

Finally, assuming a constitutional right of access exists, allowing a preliminary examination to be closed upon a mere showing of "reasonable likelihood of substantial prejudice", as directed by the California Supreme Court, permits closures that do not follow the rules set out in *Press-Enterprise*:

> "The presumption of openness may be overcome only by an overriding interest based upon *findings* that the closure is essential to preserve higher values and is narrowly tailored to serve that interest. *The interest to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.*" (464 U.S. 501, 104 S.Ct. at p. 824.) (Emphasis added.)

It is for these reasons that this Court should find a qualified First Amendment right of public access to preliminary examinations.

I.

THE PUBLIC'S RIGHT OF ACCESS GUARANTEED BY THE FIRST AMENDMENT EXTENDS TO CRIMINAL PROCEEDINGS INCLUDING CALIFORNIA'S PRELIMINARY EXAMINATIONS

A. The preliminary examination is a "critical stage" of the criminal process where a significant number of criminal cases will be finally decided.

The California Supreme Court in *Press-Enterprise Company* v. *Superior Court (Diaz)*, 37 Cal.3d 772, 775-777, 681

P.2d 1026, 209 Cal.Rptr. 360 (1984)[1] has found no constitutional right to public access at preliminary hearings. In reaching this conclusion, the California Supreme Court considered and rejected the importance of the public's right of access to criminal proceedings, articulated in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), *Globe Newspaper* v. *Superior Court*, 457 U.S. 596 (1982), and *Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501 (1984). These are cases where this Court found the press and the public to have a qualified First Amendment right to attend the criminal process. In each case, the Court looked to history and policy to conclude that the public has a First Amendment-based right of access to criminal proceedings.[2]

The California Supreme Court has stated that the preliminary examination is a "critical stage" of the criminal process. (*Hawkins* v. *Superior Court*, 22 Cal.3d 584, 588, 150 Cal.Rptr. 435, 586 P.2d 916 (1978); *San Jose Mercury-News* v. *Municipal Court*, 30 Cal.3d 498, 638 P.2d 655, 179 Cal.Rptr. 772 (1982).) While *Hawkins* gives every felon an absolute right to a preliminary hearing, the California Supreme Court failed to articulate a corresponding right of access by the public.

The California preliminary examination is the type of criminal proceeding that takes on many of the aspects of a public trial that gave way to the public's right to access noted in *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise*. The very nature of a preliminary exami-

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[1] Hereinafter referred to as *Diaz*.

[2] See also *Waller* v. *Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984), in which this Court held that closure of a pretrial suppression hearing over the defendant's objection violated the Sixth Amendment guarantees for public trials.

nation warrants a *qualified* constitutional right of public access. In a high percentage of criminal cases, the proceedings surrounding such examination will constitute the only "trial" of the issues in the case. (See, e.g., *San Jose Mercury-News* v. *Municipal Court,* 30 Cal.3d 498, 511, 638 P.2d 655, 179 Cal.Rptr. 772 (1982), citing California Department of Justice *Crime and Delinquency in California,* Part II, 10.[3])

Looking at the California preliminary hearing itself, this Court will find an impressive array of procedural and substantive rights that take on the aura of a "mini-trial":[4]

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[3]For example, the 1984 Riverside County District Attorney's Annual Report reflects 1006 defendants pled guilty before the magistrate prior to the preliminary examination (California Penal Code Section 859a). Over 554 defendants requested their right to a preliminary examination and ultimately pled guilty in Superior Court. One hundred thirty-five defendants chose jury trials while 14 defendants went to court trials. Thus to 1560 felons, the preliminary hearing stage by plea or hearing became the most important aspect in the procedural and substantive forest before sentencing in Superior Court. Only 149 felons or 12% received public trials. Thus the public's only right to access to 88% of the cases occurred either at the preliminary hearing stage or pretrial and sentencing hearings in Superior Court. According to the Department of Justice, Bureau of Criminal Statistics, this appears to be the statewide trend throughout California for adult felony arrest dispositions for 1984. (See Exhibit A.)

In *Waller* v. *Georgia,* this Court noted: "In *Gannett* as in many cases, the suppression hearing was the *only* trial, because the defendants thereafter pled guilty pursuant to a plea bargain" (467 U.S. ——, 104 S.Ct. at 2216).

[4]*Mercury News* v. *Municipal Court,* 30 Cal.3d 498, 510:

> "Preliminary hearings are a critical step in the accusatory process. Though they do not resemble the trial in all particulars, ... there are many similarities. Witnesses may be cross-examined, credibility is crucial, and each side has an incentive to prevail. The hearing may reveal weaknesses in prosecution or defense evidence that forecast the ultimate disposition. [Par.] Further, when exclusion of evidence is not at issue the preliminary hearing may turn out to be 'the only judicial proceeding of substantial importance that takes place during a criminal prosecution....' It has been reported that in 1978 only 3.2 percent of all felony-arrest dispositions in this state involved trials.... [Par.] The preliminary hearing often provides a forum for adjudication of issues involving police misconduct and exclusion of evidence. In many cases it may provide the sole occasion for public observation of the criminal justice system...."

However, sanity and competency issues cannot be litigated at the preliminary examination stage. See California Penal Code Sections 1026 and 1368.

[5]In *Waller* v. *Georgia,* 467 U.S. 39, 104 S.Ct. 2210 (1984), while discussing the First Amendment issues concerning the importance of public scrutiny of governmental acts, this Court stated:

> "The need for an open proceeding may be particularly strong with respect to suppression hearings ... any closure of a sup-

1. Advisement of the defendant: legal and constitutional rights, including the right to a court appointed attorney. (Penal Code Sections 859, 866.5.)

2. Confrontations and cross-examination of witnesses against the accused (Penal Code Section 865).

3. Exclusion of witnesses (Penal Code Section 867).

4. Defense testimony of any kind (Penal Code Section 866).

5. Continuances (Penal Code Section 861).

6. All of the constitutional exclusionary rules are available to the defendant (Penal Code Section 1538.5 et seq.).[5]

7. Challenges to the identity of a confidential informant (California Evidence Code Section 1042).

8. Challenges to eyewitness information and the admissibility of admissions or confessions can be made (*People* v. *Malich*, 15 Cal.App.3d 253, 93 Cal.Rptr. 87 (1971)).

9. The magistrate may determine the credibility of witnesses and make factual findings that cannot be changed by a higher court (*DeMond* v. *Superior Court*, 57 Cal.2d 340, 19 Cal.Rptr. 313, 368 P.2d 865 (1962)).

10. The magistrate has the power on its own motion to dismiss the action in the furtherance of justice, or reduce the charges (Penal Code Sections 1385, 17(b)(5)).

11. A holding by the magistrate that there "is sufficient cause to believe the defendant guilty thereof" (Penal Code Section 872).

These procedural and substantive rights illustrate clearly that the problem of potential prejudice to the defendant is not substantially different in the context of preliminary examinations than it is in the context of public trials.

B. The social benefits derived from open trials and other criminal proceedings are compelling at the preliminary hearing stage.

This Court has identified four benefits from public access to criminal proceedings: (1) Improved quality of the proceedings; (2) Increased public understanding of the criminal justice system; (3) Public confidence in the

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pression hearing over objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors."

system; and (4) "Community therapeutic value", associated with the view that the criminal justice system is functioning and the law is being enforced. (*Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 823-824, 78 L.Ed.2d 637-638 (1984). See also *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604-606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Nebraska Press Association* v. *Stuart*, 427 U.S. 531, 559-561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Press-Enterprise Company* v. *Superior Court (Diaz)*, 37 Cal.3d at 779-780; and *San Jose Mercury-News* v. *Municipal Court*, 30 Cal.3d 498.[6])

Each of these benefits should apply with full force to public access to preliminary examinations.[7] These societal interests, served by public access, are drastically compromised whenever public attendance is curtailed during preliminary examinations. Public understanding, confidence and therapy obviously are not increased if its members are excluded from the only evidentiary hearing conducted in the vast majority of felony cases.

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[6]A preliminary hearing that is guaranteed to be open will help to "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct. . . ." (*Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. at 823-824, 78 L.Ed.2d at 637 (1984).)

[7]Recently, in *Tribune Newspapers West, Inc.* v. *Superior Court*, 172 Cal.App.3d 443, 218 Cal.Rptr. 505 (1985), a California Court of Appeal recognized a qualified right of public access to juvenile court proceedings.

II.

ALLOWING A PRELIMINARY EXAMINATION TO BE CLOSED UPON A MERE SHOWING OF "REASONABLE LIKELIHOOD OF SUBSTANTIAL PREJUDICE", UNCONSTITUTIONALLY PERMITS CLOSURES IN WHICH THE VALUE OF OPENNESS IS NOT OUTWEIGHED BY OR ESSENTIAL TO THE SIXTH AMENDMENT RIGHT OF FAIR TRIAL

A. The Diaz case does not require a specific finding of an overriding Sixth Amendment interest to justify closure of a preliminary examination.

The California Supreme Court in *Diaz* held, pursuant to the California Penal Code Section 868,[8] that the defendant who has established a "reasonable likelihood of substantial prejudice" after all the evidence is considered may not be compelled to risk his fair trial right by an open hearing. Assuming the constitutional right of access extends to preliminary examinations, the ambiguous standard set by the California Supreme Court is in conflict with this Court's rulings on appropriateness of closures insofar as it fails to require an articulated weighing of interests and findings by the magistrate.

[8]Penal Code Section 868 states, in part,

> "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is *necessary in order to protect the defendant's right to a fair and impartial trial*, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination." (Emphasis added.)

In reaching this conclusion the *Diaz* case fails to address the rigorous requirement of articulated findings imposed by this Court to support a closure decision. (See, e.g., *Waller* v. *Georgia,* 476 U.S. 39, 104 S.Ct. 2210 (1984); *Press-Enterprise Company* v. *Superior Court,* 464 U.S. 501, 104 S.Ct. 824, 825, 78 L.Ed.2d 639 (1984); *Application of the Herald Co.,* 734 F.2d 93, 100, 101 (2d Cir. 1984); *Associated Press* v. *United States District Court for Central District of California,* 705 F.2d 1143, 1146 (9th Cir. 1983); *United States* v. *Chagra,* 701 F.2d 354, 361, 365 (5th Cir. 1983); *United States* v. *Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982); *United States* v. *Criden,* 675 F.2d 550, 560-561 (3d Cir. 1982).)

An absence of guidance in this area has left courts to fashion their own tests for striking "the balance of interest" between a fair trial or preliminary examination and a free press. *Diaz* is an example of the need for this Court to set the necessary guidelines and rules to be used by all courts, thus eliminating the conflict and confusion that presently exists.[9]

[9]Even in California, courts have conflicting standards when closing the preliminary hearing. In *Eversole* v. *Superior Court,* 148 Cal.App.3d 188, 195 Cal.Rptr. 816 (1983), a defendant charged with rape and other offenses petitioned the Court of Appeal for an extraordinary writ after the magistrate ordered the preliminary hearing closed during the testimony of the minor victim on motion of the People pursuant to California Penal Code Section 868.7. The Court of Appeal issued a writ commanding the trial court to take no further action in the case other than to dismiss. The Court held that, before ordering a preliminary hearing examination closed during

The facts in *Diaz* provide little guidance for trial courts in closing preliminary hearings. The exhibits introduced by the Diaz defense demonstrate extensive media coverage during the investigation before the preliminary hearing was held. Defense counsel cited two newspaper articles dealing with the circumstances surrounding the hospital deaths. The articles did not contain any gory or gruesome details of the crime or admissions of guilt by the defendant. Some of the articles dealt with collateral events, lawsuits filed by the defendant and interviews with medical personnel associated with the hospital. Defense counsel cited nineteen articles between November 23, 1981 and September 1, 1982; however, eight of the articles dealt with the affairs of the Public Defender's Office and, specifically, they concerned the public defenders assigned to represent the defendant, not accounts of the actual case. After September 1, 1982, four articles were submitted to the court's consideration. None of these articles were so hostile, sensational or inflammatory so as to reasonably support an inference of substantial prejudice. The magistrate made no specific findings regarding the prejudicial nature of this publicity. Consequently, the preliminary examination was closed on *mere speculation.*

While the manner and style of media coverage may be one factor relevant to the issue of access,[10] (e.g., *Chandler*

testimony of a minor victim, the magistrate must first specify findings that testifying before the general public would threaten the minor with serious psychological harm and that no alternative means are available to avoid the perceived harm. The magistrate apparently erred in not making findings to support the closure.

[10]There are instances where the news media themselves may contribute substantially to a climate of partiality, either through the manner of reporting, the characterization of the accused, the interviewing of witnesses or others. (See, e.g., *Sheppard* v. *Maxwell,* 384

v. *Florida,* 449 U.S. 560 (1981), it would appear the record reflects that the media acted with concern and responsibility in covering the murder of twelve hospital patients in this case.

B. The Diaz case does not set forth a clear evidentiary burden to justify closure of a preliminary examination.

Whether the proponent of the closure is for the benefit of the accused's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, the "balance of interests must be struck with special care". (*Waller* v. *Georgia, supra,* 104 S.Ct. at 2215.)[11]

U.S. 333, 865 S.Ct. 1507 (1966); *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *People* v. *Gomez,* 41 Cal.2d 150, 258 P.2d 825 (1953).)

[11]California Penal Code Section 868.7 allows a magistrate to close a preliminary hearing upon motion of the prosecutor in certain narrowly defined cases:

> "(a) Notwithstanding any other provision of law, the magistrate may, upon motion of the prosecutor, close the examination in the manner described in Section 868 during the testimony of a witness:
>
> "1) Who is the complaining victim of child abuse as defined in Section 11165, or a sex offense, where testimony before the general public would be likely to cause serious psychological harm to the witness and where no alternative procedures, including, but not limited to, video taped deposition or contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television, are available to avoid the perceived harm.
>
> "(2) Whose life would be subject to a substantial risk in appearing before the general public, and where no alternative security measures, including, but not limited to, efforts to conceal his or her features or physical description, searches of members of the public attending the examination, or the tempo-

The evidence produced at the preliminary examination in the case below was a factual account of the circumstances surrounding the deaths of the twelve victims charged in the Information. Most of the testimony and the evidence was scientific in nature. The remainder of the evidence consisted of personal observations of medical personnel who worked with the defendant on particular shifts when the patient-victims died. None of the evidence or testimony was of a nature as to be particularly inflammatory or sensational to lend itself a massive deluge of media coverage wherein there would be a substantial or even a reasonable likelihood of prejudice to the defendant.

Further, the preliminary hearing record does not contain potentially inadmissible evidence which could be disseminated to the public or potential jurors before trial. A motion to suppress evidence was filed by the defense counsel to suppress evidence seized at the defendant's home before his arrest. The motion was taken off calendar because the People stipulated that the seized evidence would not be introduced at the preliminary hearing.

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rary exclusion of other actual or potential witnesses, would be adequate to minimize the perceived threat.

"(b) In any case where public access to the courtroom is restricted during the examination of a witness pursuant to this section, a transcript of the testimony of that witness shall be made available to the public as soon as is practicable."

The legislative intent was to set up strict guidelines for the court in balancing the public interest in open proceedings and the personal safety and well-being of witnesses. The section further places on the magistrate the additional obligation to seek out viable alternatives to closure. The burden on the prosecutor is clear and the necessary showing is well defined and specific. The same caliber of guidelines are necessary for the equitable and practical application of Section 868.

Additionally, no confessions made by the defendant were introduced at the preliminary hearing. The preliminary hearing record contains factual, competent evidence.

The *Diaz* case, gives no guidance for either the proponent or opponent of a closure motion in meeting the "requirements" under Penal Code Section 868. When is there a "clear and present danger of prejudice"? The California Supreme Court states "once a defendant establishes a reasonable likelihood of substantial prejudice, there is clear and present danger of prejudice and the prosecution or media may overcome the defendant's showing by a preponderance of the evidence to the effect that there is no reasonable likelihood of prejudice." (*Press-Enterprise Company (Diaz)* v. *Superior Court,* 37 Cal.3d at 782.) However, for the proponent requesting closure, there is no practical evidentiary burden to meet other than to satisfy the unfettered discretion of the magistrate or trial judge that there is a "reasonable likelihood of substantial prejudice". The *Diaz* case imposes no effective standards by which that discretion is to be exercised. How can the trial level proponents or opponents meet their burden? As pointed out by Justice Lucas, in his concurring and dissenting opinion, the *Diaz* case bleeds out the only specific meaning in the word *"necessary"* from Penal Code Section 868.[12] Since the California

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[12]"In the present case, on denying petitioner's motion to inspect the preliminary hearing transcripts, the trial court found merely that there was a "reasonable likelihood" of prejudice to the defendant, a standard which the majority now embraces. Yet a showing of "reasonable likelihood" of prejudice is not equivalent to a showing of necessity. In my view, the majority's new standard improperly ignores the statutory language.

"As the majority concedes, 'The legislative history . . . as well as its use of the word "necessary," makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than

Supreme Court requires no specific findings, its test of "reasonable likelihood of substantial prejudice" becomes ambiguous and unclear in application.

C. The Diaz case does not require the magistrate to consider alternatives to closure or to consider whether closure will be effective in the particular case.

This Court has repeatedly stressed that less drastic alternatives to complete closure should be considered prior to a decision to deny public access to judicial proceedings.

In *Waller* v. *Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 2216-2217 (1984), in which a seven-day suppression hearing was apparently closed based on governmental interests associated with two-and-one-half hours of tape recorded conversations, this Court stated:

> "[T]he State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing. The court did not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure, *in camera* if

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the exception. "Necessary" is often used in the sense of essential. . . .' (*Ante*, p. ——.) Although a showing of actual prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a substantial probability of prejudice. (See *United States* v. *Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1167.) No such showing was made here." (37 Cal.3d at 782-783.)

> necessary, and closing only those parts of the hearing that jeopardized the interests advanced. As it turned out, of course, the closure was far more extensive than necessary." (104 S.Ct. at 2216-2217 [footnotes omitted].)

In *Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 824-826 (1984), in which six weeks of jury selection proceedings were closed and the transcripts sealed, the trial court was criticized for its failure to consider alternatives.

In *Gannett* v. *DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, Justice Blackman (concurring and dissenting opinion) noted:

> "If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require. Thus, it might well be possible to exclude the public from only those portions of the proceedings at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to suppress would not be revealed. *United States* v. *Cianfrani*, 573 F.2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed." (443 U.S. at 444-445.)

The trial court below and subsequently the California Supreme Court failed to consider these judicially sanc-

tioned alternatives relative to the length and extent of closure.

CONCLUSION

The news media is playing an ever increasing role in the day-to-day functions of the criminal justice system. The reason is obvious. In today's complex justice system, there is a need to communicate to the public what the government and the courts are doing in carrying out their respective responsibilities.

The prosecutor's responsibility to the administration of justice requires that he do nothing which will impair the right of the accused to a fair and impartial treatment in every case. As the representative of public interest, he should be open and candid with the media, always keeping in mind that his interest is to see that justice is done. In this respect, all prosecutors are faced with a very difficult task in attempting to balance both the rights of the individual accused of a crime and the right of the public to know in criminal cases.

In order to carry out our responsibility and at the same time attempt to keep a balance between the First and Sixth Amendments, there is a need to establish identifiable constitutional guidelines at the critical preliminary examination stage in a criminal case.

Certainly the First Amendment right of public access to judicial proceedings is a qualified one, which may give way in individual cases to overriding Sixth Amendment interests in which an open preliminary examination is outweighed by the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Nonetheless, a *qualified constitutional right* to an open hearing must exist, even if the balance of

interest of a particular proponent may ultimately override the public's right of access. In this context, the California Supreme Court unconstitutionally permits:

1. Closures in which the value of openness is not outweighed by a showing of potential prejudice;

2. Closures which are not essential to preserving Sixth Amendment interests or governmental interests; and

3. Closures which are not narrowly tailored to serve the interests of public understanding, tolerance, confidence or therapy.

The holding in *Diaz* demonstrates that closure can occur upon the mere showing of "possible prejudice", in the absence of any qualitative findings made by a judicial officer. This is a far cry from the view that open preliminary examinations should be the rule rather than the exception under California Penal Code Section 868.

Amicus urges this Court to establish specific guidelines and rules based upon the First Amendment to protect the public's right of access in California at the critical preliminary examination stage of the criminal process. Even if this Court were to adopt the stricter standard stated by the dissent in the *Diaz* case of a "substantial probability of prejudice", the record must ultimately specify articulate findings that can be reviewed by the appellate courts on a case-by-case basis. This is not the case today in California.

Respectfully submitted,

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County of Riverside

ADULT FELONY ARREST DISPOSITIONS IN CALIFORNIA, 1984

TABLE 1
DISPOSITIONS OF ADULT FELONY ARRESTS, 1978–1984
Type of Disposition by Number and Percent Distribution

Type of disposition	1978		1979		1980		1981		1982		1983		1984	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Disposition of felony arrests	160,004	100.0	170,880	100.0	180,203	100.0	200,168	100.0	203,806	100.0	201,158	100.0	210,388	100.0
Law enforcement releases	14,606	8.7	18,328	10.7	20,057	10.8	21,122	10.3	20,886	10.3	18,006	8.4	20,180	9.8
Complaints denied	20,888	14.0	23,332	13.8	27,026	14.8	31,312	15.3	37,010	18.2	37,216	18.5	35,488	16.9
Complaints filed	114,410	78.3	129,222	75.8	141,321	74.7	152,734	74.4	145,900	71.8	144,937	72.1	154,720	73.5
Misdemeanor	54,388	38.3	62,762	36.7	68,486	36.1	67,664	33.0	62,076	30.5	60,948	29.8	65,844	31.3
Felony	60,020	40.0	66,670	38.9	74,836	39.6	86,070	41.5	83,826	41.1	84,988	42.2	88,876	42.2
Lower court dispositions	79,863	53.2	89,881	52.8	97,712	51.6	100,763	48.1	93,980	46.1	92,063	45.8	97,767	46.5
Dismissed	24,263	16.2	28,288	16.6	30,481	16.1	29,680	14.6	28,563	14.0	28,160	14.0	29,627	14.0
Acquitted	671	.4	818	.4	833	.5	482	.2	424	.2	308	.2	208	.1
Convicted	66,818	36.7	62,774	36.7	66,588	36.2	70,822	34.4	64,843	31.8	63,584	31.6	67,932	32.3
Sentence														
Youth Authority	32	.0	36	.0	28	.0	21	.0	3	.0	6	.0	3	.0
Probation	18,311	12.2	20,608	12.0	21,447	11.3	21,740	10.6	18,663	9.2	16,257	8.1	16,361	7.8
Probation with jail	22,799	15.2	26,608	15.5	29,133	16.4	32,417	15.8	33,308	16.3	34,957	17.4	38,114	18.6
Jail	8,756	5.8	10,186	6.0	10,408	5.5	10,860	5.3	8,870	4.8	10,241	5.1	10,228	4.8
Fine	5,023	3.3	5,312	3.1	5,413	2.8	5,367	2.6	2,806	1.4	2,004	1.0	2,042	1.0
Other	88	.1	214	.1	168	.1	227	.1	173	.1	130	.1	164	.1
Superior court dispositions	34,568	23.0	38,341	22.0	43,809	23.0	51,941	25.3	51,940	25.5	52,874	26.3	56,983	27.1
Dismissed	3,758	2.5	3,702	2.2	3,906	2.1	5,018	2.4	4,519	2.2	3,986	2.0	3,858	1.8
Acquitted	808	.5	740	.4	748	.4	822	.4	821	.5	826	.4	770	.4
Convicted	29,806	18.9	34,888	20.4	38,867	20.8	46,000	22.4	46,500	22.8	48,058	23.9	52,336	24.9
Sentence														
Death	1	0	20	.0	24	.0	36	.0	38	.0	34	.0	27	.0
Prison	8,888	4.6	8,838	5.2	10,311	5.4	13,871	6.8	16,122	7.4	16,677	8.3	18,084	8.6
Youth Authority	1,268	.8	1,480	.9	1,663	.8	1,907	.8	1,262	.6	464	.2	331	.2
Probation	4,051	2.7	4,326	2.8	4,424	2.3	4,821	2.3	4,818	2.4	6,017	2.8	5,091	2.4
Probation with jail	15,478	10.3	18,150	10.8	20,743	11.0	23,234	11.3	23,474	11.5	24,540	12.2	27,260	13.0
Jail	1,113	.7	1,148	.7	1,068	.6	1,224	.6	1,162	.6	926	.5	844	.4
Fine	81	.1	80	.1	82	.0	63	.0	36	.0	28	.0	28	.0
California Rehabilitation Center	790	.5	568	.3	352	.2	438	.2	363	.2	367	.2	647	.3
State hospital[a,b]	226	.1	260	.2	266	.2	264	.1	141	.1	–	–	–	–
Other	3	.0	13	.0	13	.0	12	.0	13	.0	16	.0	15	.0

[a] Continues to state hospital as a mentally disordered sex offender.
[b] Section 6300 of the Welfare and Institutions Code for mentally disordered sex offenders was repealed in 1981, effective January 1982.
Note: Percents may not add to 100.0 because of rounding.

DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT
CRIMINAL IDENTIFICATION AND INFORMATION BRANCH
BUREAU OF CRIMINAL STATISTICS AND SPECIAL SERVICES

EXHIBIT A, Page 1

RIVERSIDE COUNTY DISTRICT ATTORNEY
SUPERIOR COURT SENTENCING
1984

	# CASES	# DEFS.	# COUNTS	CONVICTIONS A/C	CONVICTIONS LESSER	D I S M	N/G	1192.7 DA SERIOUS FELONY	DA AGREED PROC. SUSP.
JURY TRIALS	130	135	324	115	5	0	15	69	1
COURT TRIALS	12	14	38	12	0	0	2	7	0
PLEAS/DISMISSALS (SUP. CT.)	525	554	1046	453	81	20	0	142	78
859a PLEAS	981	1006	1727	956	50	0	0	191	291
VIOLATION OF PROBATION	210	220	240	217	1	2	0	18	7
CONVICTION TOTALS	1858	1929	3375	1753	137	22	17	427	377

	SENTENCE					
	PROB.	STATE PRISON # YRS.	STATE PRISON # DEFS.	C.R.C. # YRS.	C.R.C. # DEFS.	OTHER (CYA/CJ)
JURY TRIALS	18	791+ 1 DP + 3 LWOP	97	8	2	3
COURT TRIALS	4	36 + 1 DP	5	0	0	0
PLEAS/DISMISSALS (SUP. CT.)	288	1068 1/3	237	33	11	17
859a PLEAS	581	1288	409	56	20	16
VIOLATION OF PROBATION	110	180 1/3	91	22	9	8
CONVICTION TOTALS	982	3339 2/3	842	119	42	44

CASES	1858
DEFENDANTS	1929
COUNTS	3375
AS CHARGED	1753*
REDUCED	137
DISMISSED	22
NOT GUILTY	17

*Following District Attorney's Serious Felony Disposition Guidelines

No. 84-1560 (10)

In The
Supreme Court of the United States
October Term, 1984

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ROBERT RUBANE DIAZ,
Defendant.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMICUS CURIAE BRIEF OF STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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No. 84-1560

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Petitioner,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMICUS CURIAE BRIEF OF STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The State of California, by its Attorney General John K. Van de Kamp, respectfully submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4. This case questions the constitutionality of California Penal Code section 868, and California, of course, has an interest in defending the constitutionality of that statute. Supreme

Court Rule 28.4(c). The Attorney General of California is further interested in defending all constitutional guarantees, including the First Amendment rights of the press and the public. California Constitution, Art. V, § 13.

The Attorney General represents the People of the State of California in appeals from criminal convictions and, on occasion, during criminal proceedings which precede convictions. He is therefore concerned with ensuring that in all criminal proceedings in California, the constitutional right to a fair trial is protected without undue infringement upon the constitutional rights of the public and, in particular, of the press, to have access to and observe government functions.

In light of these responsibilities and concerns, the Attorney General of California wishes to participate in this action to present arguments which, while supporting petitioner's claim that the California Supreme Court erred in rejecting petitioner's First Amendment claims, also support the constitutionality of California Penal Code section 868.

California's position, simply stated, is that the California Supreme Court erroneously failed to analyze California Penal Code section 868 according to First Amendment requirements of public access. Once these First Amendment rights are recognized, the California court should be permitted to reconstrue the statute so as to encompass applicable constitutional principles. The Attorney General believes the statute will then be found to be an appropriate balance between the right to a fair trial and the right of public access. Furthermore, the California court will then be able to reevaluate the facts of this case

in light of the public access rights guaranteed by both the First Amendment and the California statute.

The decision below by the California Supreme Court jeopardizes both First Amendment rights and the co-extensive statutory rights established by California Penal Code section 868. The Attorney General of California therefore joins with petitioner in seeking a reversal of the decision below insofar as it concluded that First Amendment access rights do not extend to preliminary hearings, and also seeks to vacate and remand the case so that the California Supreme Court may properly construe and apply state law consistent with constitutional requirements

—o—

SUMMARY OF ARGUMENT

The First Amendment guarantees a right of public access to criminal judicial proceedings in which critical decisions are made and openness will lead to increased public confidence in the criminal justice system. Members of the public have the right to observe the administration of criminal justice both in order to satisfy themselves that justice is being done and in order to serve as a check to ensure that justice is, indeed, being done.

Preliminary hearings in California play a critical role in the criminal justice system, and the events which occur during a preliminary hearing frequently determine the outcome of a criminal case. Public access to preliminary hearings will promote greater understanding and acceptance of the criminal justice system, while closure of such

hearings would undermine public confidence in that system. Therefore, the public, including the press, has a constitutional right of access to preliminary hearings.

Nevertheless, this right of access is not absolute, and must be balanced against countervailing concerns of equal dimension. The right of the accused to a fair trial, the right of privacy of jurors or of witnesses, and other compelling concerns may outweigh the right of public access.

California Penal Code section 868 (hereinafter, "section 868") properly establishes a statutory right of public access to preliminary hearings, and further provides that this presumption of public access may be overcome only if closure is necessary to preserve other competing interests. The First Amendment requires no greater right of access than section 868.

Because the California Supreme Court erroneously failed to recognize the First Amendment right of public access to preliminary hearings, that court has not had the opportunity to review section 868 in light of its constitutional implications. This Court should first determine that the First Amendment applies to preliminary hearings[1], and then the California Supreme Court should be permitted to reconsider its interpretation of section 868, and the applicability of that section to the facts of the instant case, in light of the constitutional right of public access.

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1. The importance of First Amendment rights and the expectation that the instant controversy will reoccur until finally resolved justify this Court's review of this case. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982).

ARGUMENT

I

THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS EXTENDS TO PRELIMINARY HEARINGS.

The right of the public, including the press, to attend criminal judicial proceedings has received expanded recognition in the past five years. This Court has held that the First Amendment[2] establishes a right to public criminal trials (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 583, 587, and 599 (1980) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982)), and that this right of public access extends to criminal *voir dire* proceedings (*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 508-510 (1984)).

Furthermore, in *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979), a majority of the members of the Court would have found a constitutional right of public access to pretrial hearings, either under the First Amendment (*Id.*, at 397 (Powell, J., concurring)) or under the right to a public trial guaranteed by the Sixth Amendment[3] (*Id.* at 434 (Blackmun, J., concurring and dissenting, with Brennan, J., White, J., and Marshall, J.)). While the majority opinion in *Gannett* did not decide the First Amendment question, the Court did hold that "the actions of the trial judge

---

2. The First Amendment freedoms of speech and of the press are, of course, applicable to states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); and *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

3. The Sixth Amendment right to a public trial is also applicable to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S .145, 148 (1968).

here were consistent with any right of access the petitioner may have had under the First and Fourteenth Amendments" (*Id.*, at 392).

The instant case squarely addresses the issue reserved in *Gannett*, at 392—whether the First Amendment guarantees public access to pretrial hearings. Based upon the reasoning in these earlier cases and based upon the critical role preliminary hearings serve in the criminal justice system in California, the conclusion must be that a constitutional right of public access exists.

A. The Public Has the Right to Attend Criminal Proceedings in Order to Have Confidence in the Criminal Justice System.

One of the two major reasons relied upon to support a right of public access to criminal proceedings has been "the importance of the public's having accurate information concerning the operation of its criminal justice system." *Gannett*, at 397 (Powell, J., concurring).[4] The opinions of this Court and of various members of this Court have emphasized that public awareness of criminal proceedings both promotes public acceptance of the justice system and, moreover, actually contributes to promoting justice by preventing abuse of power.

Openness encourages public trust because of the "significant community therapeutic value" which results from

4. The second major reason has been the history of openness (*Richmond Newspapers*, at 565 (plurality opinion)), but this Court has also said that whether First Amendment rights may be restricted depends not on historical openness but on the state's interest supporting closure (*Globe Newspaper*, at 605 n. 13).

public observation (*Richmond Newspapers*, at 570 (Burger, C. J., for plurality)). Society needs to know that justice is being served.

> "[T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . .
>
> "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" (*Id.*, at 571).

Openness "fosters an appearance of fairness, thereby heightening public respect in the judicial process" (*Globe Newspapers*, at 606), and gives the public "confidence that standards of fairness are being observed" (*Press-Enterprise*, at 508). Openness dispels any fear that the criminal justice system is either persecuting unjustly or failing to pursue justice, and thus benefits both the accused and society as a whole.

Openness provides a further benefit by ensuring that "all participants in the criminal justice system are subject to public scrutiny as they conduct the public's business of prosecuting crime" (*Gannett*, at 412 (Powell, J., concurring)). Openness thus deters any abuse of power, and "has a ***structural*** role to play in securing and fostering our republican system of self-government" (*Richmond Newspapers*, at 587 (Brennan, J., concurring)). See also *Globe Newspaper*, at 606 (The public serves as "a check upon the judicial process.")

These dual benefits of openness were succinctly described by this Court last year in its decision extending the right of public access to juror *voir dire* examination. As the Court stated:

> "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise,* at 508.

Since openness promotes a criminal justice system which both seems fair and is fair, and secrecy undermines public confidence in the system, the First Amendment right of public access must extend to all critical phases of criminal proceedings. When decisions are made which determine the outcome of prosecutions, members of the public, including the press, have a constitutional right to be able to assure themselves that justice is in fact being served.

B. The Critical Role of Preliminary Hearings Necessitates Public Access.

Preliminary hearings have been held to be "a 'critical stage' of the State's criminal process" in California (*Hawkins v. Superior Court,* 22 Cal.3d 584, 588 (1978) quoting *Coleman v. Alabama,* 399 U.S. 1, 9-10 (1970)). Even while failing to recognize a constitutional right of access to preliminary hearings, the California Supreme Court has acknowledged that "[p]reliminary hearings are a critical step in the accusatory process" (*San Jose Mercury-News v. Municipal Court,* 30 Cal.3d 498, 510 (1982)).

Many of the disputes which would otherwise occur at trial are often resolved during the preliminary hearing. The magistrate hears and weighs the evidence and resolves conflicts in determining probable cause (*Johnson v. Superior Court,* 15 Cal.3d 248, 252 (1975); *Esteybar v. Municipal Court,* 5 Cal.3d 119, 127 (1971); and *Jones v. Superior Court,* 4 Cal.3d 660, 667 (1971), and performs "adjudicatory functions akin to the functions of a trial judge" (*People v. Uhlemann,* 9 Cal.3d 662, 667 (1973)).

A case may actually be submitted for trial on the transcript of the preliminary hearing (*Bunnell v. Superior Court,* 13 Cal.3d 592, 602 (1975).[5] And if, like the majority of cases, a case does not proceed to trial, but is resolved by a guilty plea, the preliminary hearing is likely to be the sole adversary hearing which occurs.[6] (White & Wilson, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice,* 28 Stanford L. Rev. 1207, 1220 (1976)).

In sum, preliminary hearings perform a wide variety of functions which would otherwise occur at trial and would

---

5. As reported in 1985 Annual Report, Judicial Council of California, in Fiscal Year 1983-84, 66,534 felony complaints were disposed of by California Superior Courts, and 59,824 of these dispositions were before trial (*id.,* at 119). In addition, during the same period the California lower courts disposed of 98,338 felony complaints (*id.,* at 134), and 53 percent, or approximately 52,119 of these dispositions occurred after preliminary hearings (*id.,* at 139), with 5 percent (approximately 4,956) of these being dismissed on a finding of no probable cause (Judicial Council, unreported statistics). The remaining 47 percent (approximately 46,219) were disposed of before preliminary hearing (23 percent by dismissal and 24 percent by guilty plea (*id.,* at 140)). This means that 88,342 felony complaints (59,824 in Superior Court plus 52,119 in the lower courts, less 23,601 lower court dispositions (24 percent) certified up on a guilty plea before preliminary hearing) were disposed of before trial but after preliminary hearing.

6. The adjudicatory and adversary nature of preliminary hearings distinguishes these judicial proceedings from grand jury deliberations for which no public right of access exists. As explained in *Branzburg v. Hayes,* 408 U.S. 665, 684 (1971), "the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations."

therefore, under established law, be subject to public scrutiny.[7]

Since decisions made during preliminary hearings often substitute for decisions at trial, the same concern for promoting public confidence which underlies public access to criminal trials supports public access to preliminary hearings. The public needs the same assurance that justice is being done during preliminary hearings that it needs for other determinative phases of criminal proceedings. Just as public access to criminal trials deters any abuse of power, "the preliminary hearing is intended as a judicial check on the prosecutor's initial discretionary charging powers" (White & Wilson, at 1220), and the public needs to have confidence that this process is fair. Furthermore, "public scrutiny will have the same beneficial effect on the quality and accuracy of the proceeding as it would in a trial." (Fenner & Koley, *Access to Judicial Proceedings: to Richmond Newspapers and Beyond.* 16 Harv. C.R.-C.L.L.Rev. 415, 435 (1981)). As summarized in Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings,* 91 Harv.L.Rev. 1899, 1909 (1978):

> "Because the rationale supporting the right of public access covers these [preliminary] proceedings as well, they must be considered part of the trial that is presumptively open to the public. Such proceedings air matters of public concern that may not be addressed at trial, so that if they are kept secret, discussion of the issues involved may never surface."

---

7. For an extensive discussion of the multitude of functions performed by preliminary hearings in California, see Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations,* 18 U.C.L.A. L. Rev. 636 (1971).

Even while rejecting any constitutional right of public access, the California Supreme Court has recognized that open preliminary hearings would serve the public interest, stating that "scrutiny of preliminary hearings does, of course, have many of the societal benefits that public trials and open pretrial suppression hearings help ensure." (*San Jose Mercury-News,* at 510).

The beneficial effects of openness support a constitutional right of public access to preliminary hearings. As Justice Powell has stated, "the public's interest in this proceeding often is comparable to its interest in the trial itself" (*Gannett,* at 397 n.1 (Powell, J., concurring.)). This public interest in openness may result in public suspicion of the criminal justice system if the public is excluded from preliminary hearings. As explained in Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L. Rev. 397, 413 (1961):

> "Closed hearings can lead to great amounts of misinformation and misinterpretation, as well as suspicion, and thus be more of an evil than the abuse which they are intended to correct."

Because preliminary hearings serve a critical role in the criminal justice system, because the public interest in ensuring fairness in preliminary proceedings is no less than the public interest in fair trials, and because openness fosters public confidence and the reality that justice is being served, the First Amendment right of public access extends to preliminary hearings.

II

PUBLIC ACCESS TO PRELIMINARY HEARINGS MAY BE LIMITED WHERE NECESSARY IN ORDER TO SERVE OTHER COMPELLING INTERESTS.

The applicability of the First Amendment right of access to preliminary hearings does not mean that all closures of preliminary hearings are unconstitutional. First Amendment rights have never been held to be absolute, and may be outweighed by compelling competing interests. The Attorney General of California submits that California Penal Code section 868 statutorily authorizes California courts to engage in precisely the same balancing process required under the First Amendment, and that once this Court establishes the constitutional right of public access, and the parameters of that right, California courts will interpret section 868 so as to comply with constitutional requirements.

A. Any Denial of Public Access Must Be Justified By Compelling Interests And Must Be Narrowly Tailored To Serve Those Interests.

In cases where this Court has held that the First Amendment guarantees a right of public access to criminal justice proceedings, the Court has also held that this right is not without limit. Countervailing interests such as the right of the accused to a fair trial[8] and the privacy

8. The defendant's right to a fair trial is an overriding consideration which may require closure. *Richmond Newspapers* at 564 (plurality opinion); *Cannett*, at 393.

rights of victims or witnesses[9] or jurors[10] must also be taken into consideration, and may justify closure despite the presumption of openness. As stated in *Globe Newspaper*, at 606, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute." See also *Richmond Newspapers*, at 581 n. 18 (plurality opinion) and at 600 (Stewart, J., concurring).

However, while First Amendment rights are not absolute, any curtailment of such fundamental rights must be strictly scrutinized to ensure that the limitations are both essential to serve competing interests and no greater than necessary to satisfy these other interests. The applicable standard of review for denials of the right of public access to criminal proceedings is identical to that used to review other infringements of fundamental rights:

> "[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspapers*, at 607.
>
> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise*, at 510.

In order to ensure that this standard is satisfied, the Court has set forth various prerequisites which should be satisfied before closure is approved. The interests served

9. In *Globe Newspaper*, at 607, the Court recognized that safeguarding the well-being of minor victims of sex crimes was a compelling interest.

10. In *Press-Enterprise*, at 511-512, the Court recognized that valid privacy interests of jurors may compel denying access to certain *voir dire* information.

by closure must be articulated and supported by findings that closure is essential (*Press-Enterprise,* at 510; *Richmond Newspapers,* at 580 (plurality opinion)), and alternatives to closure must be considered (*Press-Enterprise,* at 511; *Richmond Newspapers,* at 580-581 (plurality opinion)). Furthermore, members of the public including the press, who object to closure should be given an opportunity to be heard (*Gannett,* at 392-393).

Any "failure to articulate findings with the requisite specificity" or "failure to consider alternatives to closure" denies adequate protection to First Amendment rights (*Press-Enterprise,* at 513). But there is no constitutional informity where a closure order is narrowly tailored to serve compelling interests (*Gannett,* at 393; *United States v. Smith,* — F.2d — (3d Cir., Nov. 6, 1985).

B. Section 868 Incorporates The 'Compelling Interest' Test Required By The First Amendment.

Since the California Supreme Court erroneously concluded that "the First Amendment access right does not extend to preliminary hearings" (*Press-Enterprise Co. v. Superior Court,* 37 Cal.3d 772, 777), it had no opportunity to review section 868 in light of the constitutional requirements discussed above. A remand is therefore appropriate to permit reconsideration of the state law questions as to the proper interpretation of the standard for closure established in section 868 and whether the facts of the instant case satisfy the statutory standard.[11]

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11. Because the California Supreme Court erroneously rejected the applicability of the First Amendment, it construed

(Continued on following page)

This Court has been asked by petitioner to rule that section 868 violates the First Amendment, and a response to this claim is required to show that section 868 is susceptible to a constitutional interpretation. The Attorney General of California urges this Court to deny petitioner's request to rule that the state statute is unconstitutional on its face, and instead to permit the California Supreme Court to reconstrue the statute according to constitutional standards.

California Penal Code section 868 provides, in pertinent part:

> "The examination shall be open and public. However, upon the request of the defendant and *a finding* by the magistrate *that exclusion of the public is necessary* in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter, and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other

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(Continued from previous page)

section 868 under a misperception of federal law. This Court should therefore vacate and remand "so that the [state] court may reconsider the state law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes v. Wold Engineering, P.C.,* 467 U.S. 138, — [104 S.Ct. 2267, 2277] (1984).

than the prosecuting witness, who is a witness in the examination." (Emphasis added).

Section 868 therefore requires a specific finding that closure is necessary to protect the right of the accused to a fair trial.[12] The word "necessary" encompasses the same standard of being narrowly tailored to serve compelling interests that the First Amendment imposes on closure orders. See *Globe Newspaper,* at 607. (The denial of access must be "necessitated.").

Section 868 was enacted as an urgency measure in its current form in 1982. (Cal. Stats. 1982, c. 83, p. 245, § 3). It has been described as a "legislative accommodation of the competing interests in free speech and fair trial" (*Eversole v. Superior Court,* 148 Cal.App.3d 188, 196-197 (1983)). A corollary statute enacted together with section 868 and balancing public access against privacy rights has been held to require specific findings of compelling interest and consideration of alternatives to closure (*Eversole,* at 200-201). Furthermore, closure decisions must be made on a case-by-case basis. *Compare Eversole,* at 199, with *Globe Newspaper,* at 608.

The word "necessary" connotes that closure should not be permitted unless essential (Webster's Third New International Dictionary, Unabridged (1961) 1511). And since this statutory requirement is clear and unambiguous, the word "necessary" should be given its customary import (*People v. Belleci,* 24 Cal.3d 879, 884 (1979)).

---

12. California Penal Code sections 868.5 and 868.7 provide additional statutory authority for closure of preliminary hearings in order to protect privacy rights and security needs of witnesses. Such closure on a case-by-case determination of necessity was approved in *Globe Newspaper,* at 609.

Furthermore, the California Supreme Court recognized in its decision below that the California "Legislature intended the courts to determine the appropriate standard" of necessity under section 868 (*Press-Enterprise Co. v. Superior Court,* 37 Cal.3d 772, 779 (1984)). Once this Court determines that the appropriate standard for closure of preliminary hearings is the "compelling interest" test discussed above, California courts will be able to apply this standard in ruling upon motions under section 868.

Section 868 is therefore susceptible to an interpretation fully consistent with First Amendment requirements. One Justice of the California Supreme Court has already stated that the right of access under section 868 is co-extensive with First Amendment rights (*Press-Enterprise, Co. v. Superior Court,* 37 Cal.3d 772, 782 (1984) (Grodin, J., concurring)). Once this Court concludes that the First Amendment right of public access extends to preliminary hearings, the matter should be remanded so as to permit the California court to interpret section 868 consistent with constitutional requirements.

—o—

CONCLUSION

For the foregoing reasons, amicus curiae Attorney General of the State of California respectfully urges this Court to hold that the First Amendment does guarantee a right of public access to preliminary hearings, and to reverse the decision below insofar as it reaches a contrary conclusion. Furthermore, the Attorney General requests that this matter be remanded so as to permit the Cali-

fornia court to construe section 868 in accordance with constitutional requirements.

DATED: November 29, 1985.

Respectfully submitted

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